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UNITED STATES REPORTS

VOLUME 344

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1952

FROM OCTOBER 6, 1952, THROUGH FEBRUARY 9, 1953

WALTER WYATT
REPORTER OF DECISIONS

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ERRATA.

314 U. S. 334, note 14, line 14: "8328" should be "8117".

343 U. S. 136. The citation in the last line on the page should be: 62 Stat. 793, 18 U. S. C. § 1951 (b)(2).

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.
SHERMAN MINTON, Associate Justice.

JAMES P. McGRANERY, Attorney General.[1]
HERBERT BROWNELL, Jr., Attorney General.[2]
WALTER J. CUMMINGS, Jr., Solicitor General.[3]
ROBERT L. STERN, Acting Solicitor General.[4]
HAROLD B. WILLEY, Clerk.[5]
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.[6]
HELEN NEWMAN, Librarian.

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*Notes on p. IV.

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NOTES.

[1] Attorney General James P. McGranery resigned effective January 20, 1953.

[2] Mr. Herbert Brownell, Jr., of New York, was nominated to be Attorney General by President Eisenhower on January 20, 1953; the nomination was confirmed by the Senate on January 21, 1953; he was commissioned and took the oath of office on January 21, 1953.

[3] Mr. Walter J. Cummings, Jr., of Illinois, was commissioned as Solicitor General by President Truman on November 28, 1952 (a recess appointment), and took the oath of office on December 2, 1952. His nomination as Solicitor General by President Truman on January 9, 1953, was not acted upon by the Senate. He resigned effective March 1, 1953.

[4] Between August 15, 1952, the effective date of Solicitor General Perlman's resignation (see 343 U. S. p. IV, note 3), and the date Mr. Cummings took office, and also after the effective date of Mr. Cummings' resignation, the duties of the office of Solicitor General were performed by Mr. Robert L. Stern, First Assistant to the Solicitor General, who signed government briefs and appeared as "Acting Solicitor General."

[5] Mr. Harold B. Willey was appointed Clerk of the Court on October 9, 1952, to succeed the late Charles Elmore Cropley, and took the oath of office on October 13, 1952. See *post*, pp. VII, IX, 801.

[6] Mr. T. Perry Lippitt was appointed Marshal of the Court on June 9, 1952, effective upon the retirement of Thomas Ennalls Waggaman at the close of business June 30, 1952. See 343 U. S., p. VII. He took the oath of office on June 30, 1952.

SUPREME COURT OF THE UNITED STATES.

Allotment of Justices.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, Fred M. Vinson, Chief Justice.

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, Robert H. Jackson, Associate Justice.

For the Third Circuit, Harold H. Burton, Associate Justice.

For the Fourth Circuit, Fred M. Vinson, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Stanley Reed, Associate Justice.

For the Seventh Circuit, Sherman Minton, Associate Justice.

For the Eighth Circuit, Tom C. Clark, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Tom C. Clark, Associate Justice.

October 14, 1949.

(For next previous allotment, see 337 U. S. p. iv.)

DEATH OF CHARLES ELMORE CROPLEY, CLERK OF THE COURT.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 6, 1952.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON.

THE CHIEF JUSTICE said:

"With deep personal sorrow the Court learned of the death of its Clerk, Charles Elmore Cropley, on June 17, 1952.

"Born in 1894, Mr. Cropley lived in Washington throughout his life. At the age of 13 he began his career with this Court as a page boy. For two years, during 1911 and 1912, he left the Court to work in the Library of Congress and the Smithsonian Institution. However, in 1913, he returned as an Assistant Clerk. On June 6, 1927, he was appointed Clerk. He served in this capacity until his death.

"Charles Elmore Cropley loved and revered the Court. He brought to his office a degree of thoroughness and courteous dignity seldom found today. These qualities won for him the respect and friendship of the Court, its staff, and of lawyers and litigants throughout the Nation. On the occasion of his fortieth anniversary with the Court in 1948, the American Bar Association Journal praised his 'long and distinguished service, for which many lawyers have been unceasingly grateful from the time they first stepped timidly and hesitantly into the office of the Clerk of this great Court.'

"It was a part of Mr. Cropley's duties to furnish the Court with annual reports which reviewed the affairs of

his office. Countless expressions in these reports reflect the full measure of his devotion, not just to his particular duties, but to the Court as an institution. He sometimes referred to his position as Clerk, not as his 'job,' but as his 'stewardship.' He spoke regularly of his 'inherent desire to preserve and perpetuate the traditions' of his office, of his respect and indebtedness to his associates for 'their loyal support in our common endeavor.' Even the various statistics, which he was called upon to recite to the Court, were phrased, not in the sterile language of the usual report, but in the language of one who cherishes a strong personal attachment to his duty. Thus, in commenting on the increased number of applications for membership to the Bar of the Court after 1945, Mr. Cropley wrote feelingly of the great number of lawyers who 'were done with the brutality of war,' who now sought the chance to serve 'in the Supreme legal forum where civilized process justly composes the conflicts of men.' On another occasion he wrote: 'The nearly forty years since I first came to the Court gleam with innumerable facets of memory—those are my cherished and enduring gifts from the Court.'

"Perhaps, among those memories, were the proceedings of the Court on Monday, June 6, 1927. Chief Justice Taft observed: 'The Court takes great pride in the history of the maintenance of the traditions of the Clerk's office and of the length of service of those who administered it.' And, in announcing Mr. Cropley's appointment as Clerk, the Chief Justice said: 'He has great familiarity with the duties of the office and carries with him to its headship the traditions that have secured such distinguished and useful service by . . . his predecessors, with the probability of a life of long usefulness.'

"Surely this expression of confidence has been fulfilled. With sorrow we must now mark the end of Mr. Cropley's 'stewardship,' but we may always take pride that he served so well, that he, himself, was always so proud to have opportunity to serve so well."

APPOINTMENT OF HAROLD B. WILLEY AS CLERK OF THE COURT.*

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 13, 1952.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON.

THE CHIEF JUSTICE said:

"I am pleased to announce the appointment by the Court of Harold B. Willey to be its Clerk to succeed the late Charles Elmore Cropley.

"While an Assistant Clerk, Mr. Willey received his degree in law from the George Washington University Law School, and was admitted to the Bar of this Court in 1935. He was appointed a Deputy Clerk in 1941. He has spent some 28 years in the service of the Court performing his duties with marked ability.

"We are confident that Mr. Willey will continue to serve efficiently with courtesy to the Bar and the litigants before this Court; that he will be a worthy successor to the 10 other gentlemen who have preceded him in this position of honor and trust."

An order approving Mr. Willey's bond was entered on October 13, 1952, and he took the oath of office on the same day.

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*For order of appointment entered October 9, 1952, see *post*, p. 801.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1952.

BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL.

NO. 8. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.*

October 8, 1952.

In two cases set for argument in October, laws of Kansas and South Carolina providing for racial segregation in public schools were challenged as violative of the Fourteenth Amendment. In another case raising the same question with respect to laws of Virginia, appellants had filed a statement of jurisdiction and a motion requesting that all three cases be argued together. There was pending in the United States Court of Appeals for the District of Columbia Circuit a case in which segregation in public schools of the District of Columbia was challenged as violative of the Fifth Amendment. *Held:*

1. The Kansas and South Carolina cases are continued on the docket; probable jurisdiction is noted in the Virginia case; and arguments in all three will be heard in December. Pp. 2–3.

2. Judicial notice is taken of the pendency of the District of Columbia case. The Court will entertain a petition for certiorari in that case, which, if presented and granted, will afford opportunity for argument of that case immediately following arguments in the other three cases. P. 3.

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*Together with No. 101, *Briggs et al.* v. *Elliott et al., Members of Board of Trustees of School District #22,* on appeal from the United States District Court for the Eastern District of South Carolina; and No. 191, *Davis et al.* v. *County School Board of Prince Edward County et al.,* on appeal from the United States District Court for the Eastern District of Virginia.

The following are citations to the reports of the decisions below: No. 8, the *Kansas* case, 98 F. Supp. 797; No. 101, the *South Carolina* case, 103 F. Supp. 920; No. 191, the *Virginia* case, 103 F. Supp. 337.

Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, George E. C. Hayes, George M. Johnson, William R. Ming, Jr., James M. Nabrit, Jr. and *Frank D. Reeves* for appellants. *Oliver W. Hill* was also with them on the brief in No. 191.

T. C. Callison, Attorney General of South Carolina, *John W. Davis, Robert McC. Figg, Jr.* and *William R. Meagher* for appellees in No. 101.

J. Lindsay Almond, Jr., Attorney General, and *Henry T. Wickham,* Assistant Attorney General, for the State of Virginia, and *T. Justin Moore, Archibald G. Robertson* and *John W. Riely* for the Prince Edward County School Board et al., appellees in No. 191.

Per Curiam.

In two appeals now pending, No. 8, *Brown et al.* v. *Board of Education of Topeka et al.,* and No. 101, *Briggs et al.* v. *Elliott et al.,* the appellants challenge, respectively, the constitutionality of a statute of Kansas, and a statute and the Constitution of South Carolina, which provide for segregation in the schools of these states. Appellants allege that segregation is, *per se,* a violation of the Fourteenth Amendment. Argument in these cases has heretofore been set for the week of October 13, 1952.

In No. 191, *Davis et al.* v. *County School Board of Prince Edward County et al.,* the appellants have filed a statement of jurisdiction raising the same issue in respect to a statute and the Constitution of Virginia. Appellees in the *Davis* case have called attention to the similarity between it and the *Briggs* and *Brown* cases; by motion

they have asked the Court to take necessary action to have all three cases argued together.

This Court takes judicial notice of a fourth case, which is pending in the United States Court of Appeals for the District of Columbia Circuit, *Bolling et al.* v. *Sharpe et al.*, No. 11,018 on that court's docket. In that case, the appellants challenge the appellees' refusal to admit certain Negro appellants to a segregated white school in the District of Columbia; they allege that appellees have taken such action pursuant to certain Acts of Congress; they allege that such action is a violation of the Fifth Amendment of the Constitution.

The Court is of the opinion that the nature of the issue posed in those appeals now before the Court involving the Fourteenth Amendment, and also the effect of any decision which it may render in those cases, are such that it would be well to consider, simultaneously, the constitutional issue posed in the case of *Bolling et al.* v. *Sharpe et al.*

To the end that arguments may be heard together in all four of these cases, the Court will continue the *Brown* and *Briggs* cases on its docket. Probable jurisdiction is noted in *Davis et al.* v. *County School Board of Prince Edward County et al.* Arguments will be heard in these three cases at the first argument session in December.

The Court will entertain a petition for certiorari in the case of *Bolling et al.* v. *Sharpe et al.*, 28 U. S. C. §§ 1254 (1), 2101 (e), which if presented and granted will afford opportunity for argument of the case immediately following the arguments in the three appeals now pending.

It is so ordered.

Mr. Justice Douglas dissents from postponing argument and decision in the three cases presently here for *Bolling et al.* v. *Sharpe et al.*, in the United States Court of Appeals for the District of Columbia Circuit.

CIVIL AERONAUTICS BOARD ET AL. *v.* AMERICAN AIR TRANSPORT, INC. ET AL.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 126. Certificate dismissed October 20, 1952.

A certificate of the Court of Appeals certifying to this Court, under 28 U. S. C. § 1254 (3), questions concerning the validity of a regulation of the Civil Aeronautics Board is dismissed on the authority of cases cited in the opinion; and an application of the Board for an order requiring the Court of Appeals to send up the entire record, thus bringing up "the entire matter in controversy" for decision, is denied. Pp. 4–5.

The United States District Court for the District of Columbia enjoined enforcement of a regulation of the Civil Aeronautics Board unless and until plaintiffs were afforded "a full and fair evidentiary hearing with respect thereto." See 98 F. Supp. 660. On appeal to the United States Court of Appeals for the District of Columbia Circuit, three judges were unable to agree on a disposition of the case and certified to this Court questions concerning the validity of the regulation. The Civil Aeronautics Board applied to this Court under Rule 37 (2) of the Rules of this Court for an order requiring the Court of Appeals to send up the entire record. *Certificate dismissed and order denied,* pp. 4–5.

Solicitor General Perlman and *Emory T. Nunneley, Jr.* for the Civil Aeronautics Board.

PER CURIAM.

The certificate is dismissed. *Labor Board* v. *White Swan Co.,* 313 U. S. 23 (1941); *Lowden* v. *Northwestern National Bank & Trust Co.,* 298 U. S. 160 (1936); *White*

v. *Johnson,* 282 U. S. 367 (1931); *United States* v. *Union Pacific R. Co.,* 168 U. S. 505 (1897).

The Civil Aeronautics Board has applied to this Court for an order requiring the Court of Appeals to send up the entire record. To grant such an application would bring "the entire matter in controversy" before the Court for decision. 28 U. S. C. § 1254 (3).

Since the certificate must be dismissed, the Court should not exercise its discretionary power to bring up "the entire matter in controversy" for review. See *Cleveland-Cliffs Iron Co.* v. *Arctic Iron Co.,* 248 U. S. 178 (1918). Perhaps the Court of Appeals may now wish to hear this case *en banc* to resolve the deadlock indicated in the certificate and give full review to the entire case. This Court does not normally review orders of administrative agencies in the first instance; and the Court does not desire to take any action at this time which might foreclose the possibility of such review in the Court of Appeals.

For these reasons the Board's application is denied.

MR. JUSTICE DOUGLAS dissents.

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ARROWSMITH ET AL., EXECUTORS, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 51. Argued October 24, 1952.—Decided November 10, 1952.

In 1937 two taxpayers decided to liquidate and divide the proceeds of a corporation in which each owned 50% of the stock. Partial distributions were made in 1937, 1938, and 1939 and a final one in 1940; and the profits thereon were reported by the taxpayers in their income tax returns as "capital gains." In 1944 a judgment was rendered against the corporation and against one of the taxpayers individually. Each of the two taxpayers paid half of this judgment and deducted 100% of the amount so paid as an ordinary business loss in his income tax return for 1944. *Held:* Under §§ 23 (g) and 115 (c) of the Internal Revenue Code, these losses should have been treated as "capital losses," since they were paid because of liability imposed on the taxpayers as transferees of liquidation distribution assets. Pp. 7–9.

(a) A different result is not required because of the principle that each taxable year is a separate unit for tax accounting purposes. Pp. 8–9.

(b) Nor is a different result required as to one of the taxpayers because the judgment was against him personally as well as against the corporation. P. 9.

193 F. 2d 734, affirmed.

The Commissioner of Internal Revenue determined that a judgment loss paid by petitioners as transferees of liquidation assets of a corporation were "capital losses" under the Internal Revenue Code. The Tax Court held that they were ordinary business losses. 15 T. C. 876. The Court of Appeals reversed. 193 F. 2d 734. This Court granted certiorari. 343 U. S. 976. *Affirmed*, p. 9.

George R. Sherriff argued the cause for petitioners. With him on the brief was *Joseph C. Woodle.*

Helen Goodner argued the cause for respondent. With her on the brief were *Acting Solicitor General Stern, Assistant Attorney General Lyon, Philip Elman, Ellis N. Slack* and *Harry Baum.*

Briefs of *amici curiae* supporting petitioners were filed by *Norman D. Keller* for Edgar J. Kaufmann; and by *John W. Burke.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This is an income tax controversy growing out of the following facts as shown by findings of the Tax Court. In 1937 two taxpayers, petitioners here, decided to liquidate and divide the proceeds of a corporation in which they had equal stock ownership.* Partial distributions made in 1937, 1938, and 1939 were followed by a final one in 1940. Petitioners reported the profits obtained from this transaction, classifying them as capital gains. They thereby paid less income tax than would have been required had the income been attributed to ordinary business transactions for profit. About the propriety of these 1937–1940 returns, there is no dispute. But in 1944 a judgment was rendered against the old corporation and against Frederick R. Bauer, individually. The two taxpayers were required to and did pay the judgment for the corporation, of whose assets they were transferees. See *Phillips-Jones Corp.* v. *Parmley,* 302 U. S. 233, 235–236. Cf. I. R. C., § 311 (a). Classifying the loss as an ordinary business one, each took a tax deduction for 100% of the amount paid. Treatment of the loss as a capital one would have allowed deduction of a much smaller amount. See I. R. C., § 117 (b), (d) (2) and (e). The Commis-

*At dissolution the corporate stock was owned by Frederick P. Bauer and the executor of Davenport Pogue's estate. The parties here now are Pogue's widow, Bauer's widow, and the executor of Bauer's estate.

sioner viewed the 1944 payment as part of the original liquidation transaction requiring classification as a capital loss, just as the taxpayers had treated the original dividends as capital gains. Disagreeing with the Commissioner the Tax Court classified the 1944 payment as an ordinary business loss. 15 T. C. 876. Disagreeing with the Tax Court the Court of Appeals reversed, treating the loss as "capital." 193 F. 2d 734. This latter holding conflicts with the Third Circuit's holding in *Commissioner* v. *Switlik,* 184 F. 2d 299. Because of this conflict, we granted certiorari. 343 U. S. 976.

I. R. C., § 23 (g) treats losses from sales or exchanges of capital assets as "capital losses" and I. R. C., § 115 (c) requires that liquidation distributions be treated as exchanges. The losses here fall squarely within the definition of "capital losses" contained in these sections. Taxpayers were required to pay the judgment because of liability imposed on them as transferees of liquidation distribution assets. And it is plain that their liability as transferees was not based on any ordinary business transaction of theirs apart from the liquidation proceedings. It is not even denied that had this judgment been paid after liquidation, but during the year 1940, the losses would have been properly treated as capital ones. For payment during 1940 would simply have reduced the amount of capital gains taxpayers received during that year.

It is contended, however, that this payment which would have been a capital transaction in 1940 was transformed into an ordinary business transaction in 1944 because of the well-established principle that each taxable year is a separate unit for tax accounting purposes. *United States* v. *Lewis,* 340 U. S. 590; *North American Oil* v. *Burnet,* 286 U. S. 417. But this principle is not breached by considering all the 1937–1944 liquidation transaction events in order properly to classify the nature

of the 1944 loss for tax purposes. Such an examination is not an attempt to reopen and readjust the 1937 to 1940 tax returns, an action that would be inconsistent with the annual tax accounting principle.

The petitioner Bauer's executor presents an argument for reversal which applies to Bauer alone. He was liable not only by reason of being a transferee of the corporate assets. He was also held liable jointly with the original corporation, on findings that he had secretly profited because of a breach of his fiduciary relationship to the judgment creditor. *Trounstine* v. *Bauer, Pogue & Co.*, 44 F. Supp. 767, 773; 144 F. 2d 379, 382. The judgment was against both Bauer and the corporation. For this reason it is contended that the nature of Bauer's tax deduction should be considered on the basis of his liability as an individual who sustained a loss in an ordinary business transaction for profit. We agree with the Court of Appeals that this contention should not be sustained. While there was a liability against him in both capacities, the individual judgment against him was for the whole amount. His payment of only half the judgment indicates that both he and the other transferee were paying in their capacities as such. We see no reason for giving Bauer a preferred tax position.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE JACKSON that these losses should be treated as ordinary, not capital, losses. There were no capital transactions in the year in which the losses were suffered. Those transactions occurred and were accounted for in earlier years in accord with the established principle that each year is a separate unit for tax accounting purposes. See *United States* v. *Lewis*, 340 U. S. 590. I have not felt, as my dissent in the *Lewis* case indicates, that the law made that an inexora-

ble principle. But if it is the law, we should require observance of it—not merely by taxpayers but by the Government as well. We should force each year to stand on its own footing, whoever may gain or lose from it in a particular case. We impeach that principle when we treat this year's losses as if they diminished last year's gains.

MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins, dissenting.

This problem arises only because the judgment was rendered in a taxable year subsequent to the liquidation.

Had the liability of the transferor-corporation been reduced to judgment during the taxable year in which liquidation occurred, or prior thereto, this problem, under the tax laws, would not arise. The amount of the judgment rendered against the corporation would have decreased the amount it had available for distribution, which would have reduced the liquidating dividends proportionately and diminished the capital gains taxes assessed against the stockholders. Probably it would also have decreased the corporation's own taxable income.

Congress might have allowed, under such circumstances, tax returns of the prior year to be reopened or readjusted so as to give the same tax results as would have obtained had the liability become known prior to liquidation. Such a solution is foreclosed to us and the alternatives left are to regard the judgment liability fastened by operation of law on the transferee as an ordinary loss for the year of adjudication or to regard it as a capital loss for such year.

This Court simplifies the choice to one of reading the English language, and declares that the losses here come "squarely within" the definition of capital losses contained within two sections of the Internal Revenue

Code. What seems so clear to this Court was not seen at all by the Tax Court, in this case or in earlier consideration of the same issue; nor was it grasped by the Court of Appeals for the Third Circuit. *Commissioner* v. *Switlik,* 184 F. 2d 299 (1950).

I find little aid in the choice of alternatives from arguments based on equities. One enables the taxpayer to deduct the amount of the judgment against his ordinary income which might be taxed as high as 87%, while if the liability had been assessed against the corporation prior to liquidation it would have reduced his capital gain which was taxable at only 25% (now 26%). The consequence may readily be characterized as a windfall (regarding a windfall as anything that is left to a taxpayer after the collector has finished with him).

On the other hand, adoption of the contrary alternative may penalize the taxpayer because of two factors: (1) since capital losses are deductible only against capital gains, plus $1,000, a taxpayer having no net capital gains in the ensuing five years would have no opportunity to deduct anything beyond $5,000; and (2) had the liability been discharged by the corporation, a portion of it would probably in effect have been paid by the Government, since the corporation could have taken it as a deduction, while here the total liability comes out of the pockets of the stockholders.

Solicitude for the revenues is a plausible but treacherous basis upon which to decide a particular tax case. A victory may have implications which in future cases will cost the Treasury more than a defeat. This might be such a case, for anything I know. Suppose that subsequent to liquidation it is found that a corporation has undisclosed claims instead of liabilities and that under applicable state law they may be prosecuted for the benefit of the stockholders. The logic of the Court's decision here, if adhered to, would result in a lesser return to the

Government than if the recoveries were considered ordinary income. Would it be so clear that this is a capital loss if the shoe were on the other foot?

Where the statute is so indecisive and the importance of a particular holding lies in its rational and harmonious relation to the general scheme of the tax law, I think great deference is due the twice-expressed judgment of the Tax Court. In spite of the gelding of *Dobson* v. *Commissioner,* 320 U. S. 489, by the recent revision of the Judicial Code, Act of June 25, 1948, § 36, 62 Stat. 991–992, I still think the Tax Court is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs. I should reverse, in reliance upon the Tax Court's judgment more, perhaps, than my own.

SANFORD *v.* KEPNER.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 46. Argued October 24, 1952.—Decided November 10, 1952.

In a proceeding under R. S. § 4915, 35 U. S. C. § 63, brought by an applicant for a patent to review an adverse decision of a board of interference examiners, when a district court has found against petitioner on the issue of priority of invention it need not go further and consider the validity of a rival applicant's claim to a patent on the same device. Pp. 13–16.

195 F. 2d 387, affirmed.

In a proceeding under R. S. § 4915, 35 U. S. C. § 63, the District Court found against petitioner on an issue of priority of invention and dismissed the bill without considering the validity of a rival applicant's claim to a patent on the same device. 99 F. Supp. 221. The Court of Appeals affirmed. 195 F. 2d 387. This Court granted certiorari. 343 U. S. 976. *Affirmed,* p. 16.

J. Preston Swecker argued the cause and filed a brief for petitioner.

Hugh M. Morris argued the cause for respondent. With him on the brief were *Wilmer Mechlin* and *George R. Ericson.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Claiming he was the original and sole inventor of a mechanical device, the respondent Kepner asked the United States Patent Office for a patent. Later the petitioner Sanford filed a similar application making the same claim. As authorized by R. S. § 4904, 35 U. S. C. § 52, the Commissioner of Patents directed a board of interference examiners to hold hearings and determine the

dispute over priority of invention—which of the two first used the device. The Board decided for respondent Kepner. Sanford's application for patent was accordingly refused. As authorized by R. S. § 4915, 35 U. S. C. § 63, Sanford brought this bill in equity praying that he be adjudged inventor of the device and entitled to a patent. Sanford also prayed that Kepner's claims be adjudged unpatentable, charging that many previous patents had been granted on Kepner's device, some of which had expired. Agreeing with the Board of Interference Examiners, the District Court found against Sanford on the issue of prior use. Since this was enough to justify refusal to issue Sanford a patent, the District Court declined to go further and consider Kepner's claim to a patent. Accordingly Sanford's bill was dismissed. 99 F. Supp. 221. Agreeing with the District Court, the Court of Appeals affirmed. 195 F. 2d 387. The circuits have different views concerning the duty of district courts to consider and adjudicate questions of invention and patentability when parties urge them in R. S. § 4915 proceedings.* To settle these differences we granted certiorari. 343 U. S. 976.

So far as relevant to the precise question here, R. S. § 4915, as now contained in 35 U. S. C. § 63, reads:

> ". . . whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant . . . may have remedy by bill in equity . . . and the court . . . may adjudge that such applicant is entitled, according to law, to receive a patent for his invention . . . . And such

*In accord with the Court of Appeals, *Heston* v. *Kuhlke*, 179 F. 2d 222; *Smith* v. *Carter Carburetor Corp.*, 130 F. 2d 555; *Cleveland Trust Co.* v. *Berry*, 99 F. 2d 517. Contra: *Minneapolis Honeywell Regulator Co.* v. *Milwaukee Gas Specialty Co.*, 174 F. 2d 203; *Knutson* v. *Gallsworthy*, 82 U. S. App. D. C. 304, 164 F. 2d 497.

> adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication and otherwise complying with the requirements of law."

The obvious purpose of the quoted part of R. S. § 4915 is to give a judicial remedy to an applicant who has been finally denied a patent because of a Patent Office decision against him and in favor of his adversary on the question of priority. When the trial court decides this factual issue of priority against him and thus affirms the refusal of the patent by the Patent Office, he has obtained the full remedy the statute gives him. Only if he wins on priority may he proceed. In that event, the statute says, the court may proceed to "adjudge that such applicant is entitled, according to law, to receive a patent for his invention . . . ." So adjudging, it may authorize issuance of the patent. But judicial authorization of issuance implies judicial sanction of patentability and for this reason this Court has said, "It necessarily follows that no adjudication can be made in favor of the applicant, unless the alleged invention for which a patent is sought is a patentable invention." *Hill* v. *Wooster,* 132 U. S. 693, 698. The principle of the *Hill* case is that the court must decide whether claims show patentable inventions before authorizing the Commissioner to issue a patent. No part of its holding or wording nor of that in *Hoover Co.* v. *Coe,* 325 U. S. 79, requires us to say R. S. § 4915 compels a district court to adjudicate patentability at the instance of one whose claim is found to be groundless. Sanford's claim was found to be groundless.

It is unlikely that this equity proceeding would develop a full investigation of validity. There would be no attack on the patent comparable to that of an infringement action. Here the very person who claimed an invention

now asks to prove that Kepner's similar device was no invention at all because of patents issued long before either party made claim for his discovery. There is no real issue of invention between the parties here and we see no reason to read into the statute a district court's compulsory duty to adjudicate validity.

Affirmed.

Syllabus.

FEDERAL POWER COMMISSION *v.* IDAHO POWER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 12. Argued October 20–21, 1952.—Decided November 10, 1952.

Under § 4 (e) of the Federal Power Act, the Federal Power Commission issued to a power company a license to construct, operate and maintain a hydroelectric project including a dam, power plant and transmission lines on public lands, subject to the condition that the company permit the interconnection of transmission facilities of the United States with the company's transmission lines and the transfer over those lines of energy generated in power plants owned by the United States. The Court of Appeals held that the Commission had no authority to attach these conditions and entered a judgment that the Commission's order "be modified" and that the cause be remanded to the Commission "for the entry of an order in accordance with the opinion of this Court." On motion of the Commission for clarification, the court entered a new judgment, stating that the order of the Commission "be, and it is hereby, modified by striking therefrom paragraph (F) thereof [containing the conditions], and that the order of the Federal Power Commission herein as thus modified be, and it is hereby, affirmed." *Held:*

1. When the Court of Appeals, by its second judgment, decided that the license should issue without the conditions, it usurped an administrative function. Pp. 19–20.

(a) The power of the Court of Appeals under § 313 (b) "to affirm, modify, or set aside" an order of the Commission "in whole or in part" does not authorize it to exercise an essentially administrative function. P. 21.

(b) Whether the objective of § 10 (a) of the Act may be achieved if the contested conditions are stricken from the Commission's order is an administrative, not a judicial, decision. P. 21.

2. When read in the context of §§ 4 and 10 of the Act, § 6, making each license subject to conditions prescribed by the Commission, authorizes the Commission to attach the conditions im-

posed here; and that authority is not impaired by § 201 (f) of Part II of the Act, providing that no provision of Part II shall apply to the United States. Pp. 21–24.

(a) Protection of the public domain, conservation of water-power resources, development of comprehensive plans for waterways—each might on the facts of a case be sufficient to authorize the grant of permission to a public utility company to use the public domain provided it agreed to use its excess capacity to transmit government power. P. 23.

(b) The powers conferred by Part II of the Act to regulate public utilities engaged in the interstate transmission and sale of electric energy cannot be construed as a repeal by implication of the powers conferred by Part I to regulate public lands or the use of navigable streams. Pp. 23–24.

3. A petition to this Court for certiorari, filed within 90 days after the Court of Appeals' second judgment, though more than 90 days after the first, was timely. Pp. 19–20.

4. There is no merit in the contention that the Commission's motion for clarification was untimely under the rules of the Court of Appeals governing petitions for rehearing, since, assuming that the motion was a petition for rehearing within the meaning of the rules, it was entertained and considered on the merits. P. 21, n. 1.

89 U. S. App. D. C. 1, 189 F. 2d 665, reversed.

The Federal Power Commission issued to respondent power company, under § 4 (e) of the Federal Power Act, a conditional license to construct, operate and maintain a hydroelectric project. The Court of Appeals modified the Commission's order by striking out the conditions, and affirmed the order as thus modified. 89 U. S. App. D. C. 1, 189 F. 2d 665. This Court granted certiorari. 342 U. S. 941. *Reversed,* p. 24.

Philip Elman argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Baldridge, Paul A. Sweeney, Morton Liftin, Bradford Ross* and *Willard W. Gatchell.*

Harry A. Poth, Jr. and *A. C. Inman* argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent applied to petitioner under § 4 (e) of the Federal Power Act, 41 Stat. 1065, 49 Stat. 840, 16 U. S. C. § 797 (e), for a license to construct, operate, and maintain a hydroelectric project (known as the Bliss development) on the Snake River in southern Idaho. This project included a dam and power plant occupying some 500 acres of lands of the United States and two transmission lines. These lines for most of their length crossed lands of the United States and joined the company's interconnected primary transmission system.

The United States has power projects in this area; and the Bureau of Reclamation and the Bonneville Power Administration were contemplating the construction of a transmission line which would connect the same areas as respondent's proposed lines. Therefore the Federal Power Commission, on the suggestion of the Secretary of the Interior, authorized the project on conditions specified in paragraph (F) of the order. These conditions, in summary, were that the licensee permit the interconnection of transmission facilities of the United States with the two transmission lines, and the transfer over those lines of energy generated in power plants owned by the United States "in such amounts as will not unreasonably interfere" with the licensee's use of the lines, the United States to pay the licensee for government power so transmitted.

Respondent petitioned for review of the Commission's order. The Court of Appeals held that the Commission had no authority to attach the condition. It entered a judgment that the Commission's order "be modified" and that the cause be remanded to the Commission "for the entry of an order in accordance with the opinion of this Court." That was on May 10, 1951. 89 U. S. App. D. C. 1, 189 F. 2d 665. The Commission moved for a

clarification of the judgment. On September 21, 1951, the Court of Appeals entered a new judgment, stating that the order of the Commission "be, and it is hereby, modified by striking therefrom paragraph (F) thereof, and that the order of the Federal Power Commission herein as thus modified be, and it is hereby, affirmed." The petition for certiorari was filed within 90 days of the amended order but more than 90 days after the first order. The question which therefore lies at the threshold of the case is whether the petition is timely. See 28 U. S. C. § 2101 (c).

First. If the court did no more by the second judgment than to restate what it had decided by the first one, *Department of Banking* v. *Pink,* 317 U. S. 264, would apply and the 90 days would start to run from the first judgment. But the court by the second judgment undertook to modify the license. By the first judgment it did no more than keep the Commission within the bounds set by its opinion. On remand the Commission might have reissued the order without the contested conditions or it might have withheld its consent to any license. It is the Commission's judgment on which Congress has placed its reliance for control of licenses. See §§ 6, 10 (a), 10 (g). When the court decided that the license should issue without the conditions, it usurped an administrative function. There doubtless may be situations where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate. But the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134; *Federal Trade Commission* v. *Morton Salt Co.,* 334 U. S. 37.

The Court, it is true, has power "to affirm, modify, or set aside" the order of the Commission "in whole or in part." § 313 (b). But that authority is not power to exercise an essentially administrative function. See *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364, 373–374; *Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608. The nature of the determination is emphasized by § 10 (a) which specifies that the project adopted "shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of water-power development, and for other beneficial public uses." Whether that objective may be achieved if the contested conditions are stricken from the order is an administrative, not a judicial, decision.[1]

Second. The power of Congress over public lands, conferred by Art. IV, § 3 of the Constitution, is "without limitations," as we stated in *United States* v. *San Francisco,* 310 U. S. 16, 29. The Court of Appeals, while recognizing that principle, held that Congress had not granted the Commission authority to condition the use of public lands by requiring a public utility to carry government power. It relied on § 201 (f) of the Act which says that "No provision in this Part shall apply to . . . the United States . . . ." The Part referred to is Part II of the Act which set up a system of control over the transmission of electric energy in interstate commerce. It granted the Commission authority, among other things, to direct a public utility to establish physical connection of its transmission facilities with the facilities of other persons en-

[1] An argument is made that the Commission's motion for clarification was untimely under the rules of the Court of Appeals governing petitions for rehearing. Assuming, *arguendo,* that the motion was a petition for rehearing within the meaning of those rules, it was entertained and considered on the merits (cf. *Bowman* v. *Loperena,* 311 U. S. 262; *Pfister* v. *Finance Corp.,* 317 U. S. 144, 149) and the new judgment entered was erroneous.

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gaged in the transmission or sale of electric energy. § 202 (b). Since that power was not extended to the United States, the court concluded that a license under Part I of the Act could not be conditioned on an interconnection with federal power.

Part I and Part II provide different regulatory schemes. Part II is an exercise of the commerce power over public utilities engaged in the interstate transmission and sale of electric energy. See S. Rep. No. 621, 74th Cong., 1st Sess., p. 17. Part II does not undertake to regulate public lands or the use of navigable streams. That function is covered by Part I, which dates back to the Federal Water Power Act of 1920, 41 Stat. 1063. Section 4 (e) of Part I gives the Commission power to issue licenses to private or public bodies for the purpose of "constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, *or upon any part of the public lands and reservations of the United States* . . . ." (Italics added.)

By § 4 (g) the Commission is given authority to investigate the actual or intended occupancy of "public lands" for the purpose of developing electric power and to issue such order as it may find "appropriate, expedient, and in the public interest to conserve and utilize the . . . water-power resources of the region." As already noted, § 10 (a) provides that no license shall be granted unless in the judgment of the Commission the project "will be best adapted to a comprehensive plan . . . for the improvement and utilization of water-power development, and for other beneficial public uses . . .; and if necessary

in order to secure such plan the Commission shall have authority to require the modification of any project . . . before approval." [2]

Under these sections the Commission is plainly made the guardian of the public domain. The requirement that existing lines be fully utilized before additional lines are authorized would seem to be relevant to a decision under § 10 (a) that the project submitted was consonant with the "comprehensive plan" for the waterway. And the Commission might well determine under § 4 (g) that if public lands are to be used for the transmission of power, conservation of the "water-power resources of the region" requires that public power as well as private power be transmitted over them.

Sections 4 and 10 speak specifically of the public domain—waterways and public lands. Section 6 makes each license subject to all the terms and conditions of the Act and to "such further conditions, if any, as the Commission shall prescribe in conformity with this Act . . . ." Section 6, read in the context of §§ 4 and 10, would seem to give ample authority to the Commission to attach the conditions imposed here. Protection of the public domain, conservation of water-power resources, development of comprehensive plans for the waterways—each of these might on the facts of a case be sufficient to authorize the grant of permission to a public utility company to use the public domain provided it agreed to use its excess capacity to transmit government power.

It is difficult for us to read § 201 (f) as in any way affecting that power. Sections 201 (f) and 202 deal with interconnections of facilities generally. They do not extend the new powers granted by Part II to government

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[2] Sections 4 (e) and 10 (a) appeared in the Federal Water Power Act of 1920, 41 Stat. 1063, 1065, 1068. Section 4 (g) was added by the Public Utility Holding Company Act of 1935, 49 Stat. 838, 841.

lines. On the other hand they do not purport to change or alter any power granted under Part I. They do not deal with the grant of licenses. They do not purport to lay down conditions for the issuance of licenses for use of the public domain. We therefore cannot construe the limitation on the new powers conferred by Part II as a repeal by implication of the powers over licensees that are deeply engrained in Part I of the Act and put there by the Congress for the purpose of protecting the public domain.

Reversed.

MR. JUSTICE BURTON and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

NATHANSON, TRUSTEE IN BANKRUPTCY, *v.* NATIONAL LABOR RELATIONS BOARD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 33. Argued October 23, 1952.—Decided November 10, 1952.

The National Labor Relations Board ordered a company to pay certain employees back pay. After an involuntary petition in bankruptcy had been filed against the company, the Court of Appeals decreed enforcement of the Board's order. The Board filed in the bankruptcy proceeding a proof of claim for the back pay. *Held:*

1. The Board is a "creditor" as respects the back-pay awards, within the meaning of the Bankruptcy Act. Pp. 26–27.

2. The Board's back-pay order is a provable claim in bankruptcy—as a debt founded upon an "implied" contract within the meaning of § 63 (a) (4) of the Bankruptcy Act. P. 27.

3. The Board's claim is not a debt due to the United States within the meaning of R. S. § 3466, and it is not entitled to priority under § 64 (a) (5) of the Bankruptcy Act, though it is entitled to such priority as wage claims enjoy under § 64 (a) (2). *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, distinguished. Pp. 27–29.

4. Computation of the amount of the back-pay award was properly referred to the Board by the bankruptcy court. Pp. 29–30.

(a) The fixing of the back pay is one of the functions confided to the Board as an administrative matter. Pp. 29–30.

(b) Wise administration demands that the bankruptcy court accommodate itself to the administrative process and refer to the Board the liquidation of the claim, giving the Board a reasonable time for its administrative determination. P. 30.

194 F. 2d 248, reversed.

A proof of claim filed by the National Labor Relations Board, based on a back-pay award against the bankrupt, was disallowed by the referee in bankruptcy. The District Court set aside the disallowance. 100 F. Supp. 489. The Court of Appeals affirmed. 194 F. 2d 248. This

Court granted certiorari. 343 U. S. 962. *Reversed and remanded*, p. 31.

Joseph Kruger argued the cause for petitioner. With him on the brief were *Alan J. Dimond* and *Henry Friedman.*

Mozart G. Ratner argued the cause for respondent. With him on the brief were *Acting Solicitor General Stern, George J. Bott, David P. Findling, Owsley Vose* and *Irving M. Herman.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent, the National Labor Relations Board, issued a complaint against the present bankrupt company alleging unfair labor practices, and, after appropriate proceedings, ordered the bankrupt to pay certain employees back pay which they had lost on account of an unfair labor practice of the bankrupt. Before the order was enforced by the Court of Appeals an involuntary petition had been filed against the company. Thereafter the Court of Appeals entered its decree, enforcing the Board's order. In due course the Board filed a proof of claim for the back pay which was disallowed by the referee. The District Court set aside the disallowance. 100 F. Supp. 489. The Court of Appeals affirmed (194 F. 2d 248) holding that the Board's order is a provable claim in bankruptcy, that the Board can liquidate the claim, and that it is entitled to priority as a debt owing to the United States under § 64 (a)(5) of the Act. The petition for certiorari was granted because of a conflict on the question of priority between that decision and *Labor Board* v. *Killoren,* 122 F. 2d 609, decided by the Court of Appeals for the Eighth Circuit.

We think the Board is a creditor as respects the back pay awards, within the meaning of the Bankruptcy Act.[1] The Board is the public agent chosen by Congress to enforce the National Labor Relations Act. *Amalgamated Workers* v. *Edison Co.,* 309 U. S. 261, 269. A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 197. Congress has made the Board the only party entitled to enforce the Act. A back pay order is a command to pay an amount owed the Board as agent for the injured employees. The Board is therefore a claimant in the amount of the back pay.

The claim is provable as a debt founded upon an "implied" contract within the meaning of § 63 (a)(4) of the Bankruptcy Act.[2] It is an indebtedness arising out of an obligation imposed by statute—an incident fixed by law to the employer-employee relationship. A liability based on quasi-contract is one on an "implied" contract within the meaning of § 63 (a)(4) of the Bankruptcy Act. See *Brown* v. *O'Keefe,* 300 U. S. 598, 606–607.

We do not, however, agree with the lower court that this claim, enforceable by the Board, is a debt due to the United States within the meaning of R. S. § 3466, and therefore entitled to priority under § 64 (a)(5) of the Bankruptcy Act. It does not follow that because the Board is an agency of the United States, any debt owed it is a debt owing the United States within the meaning of R. S. § 3466. The priority granted by that stat-

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[1] " 'Creditor' shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy." 11 U. S. C. § 1 (11).

[2] "Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . . (4) an open account, or a contract express or implied." § 63 (a)(4); 11 U. S. C. § 103 (a)(4).

ute was designed "to secure an adequate revenue to sustain the public burthens and discharge the public debts." See *United States* v. *State Bank,* 6 Pet. 29, 35. There is no function here of assuring the public revenue. The beneficiaries of the claims are private persons as was the receiver in *American Surety Co.* v. *Akron Savings Bank,* 212 U. S. 557.

It is true that *Bramwell* v. *U. S. Fidelity Co.,* 269 U. S. 483, extended the priority to a claim of the United States for Indian moneys. But that case rests on the status of the Indians as wards of the United States (see *Bowling* v. *United States,* 233 U. S. 528) and the continuing responsibility which it has for the protection of their interests. See *United States* v. *Rickert,* 188 U. S. 432, 444; *Board of Commissioners* v. *Seber,* 318 U. S. 705. We cannot extend that reasoning so as to give priority to a claim which the United States is collecting for the benefit of a private party. See *American Surety Co.* v. *Akron Savings Bank, supra.* The beneficiaries here are not wards of the Federal Government; they are wage claimants who were discriminated against by their employer. The Board has eliminated the discrimination by the back pay order; and enforcement of its order has been directed by the Court of Appeals. The full sanction of the National Labor Relations Act has therefore been placed behind the order. The Board argues that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether that should be done is a legislative decision. The contest now is no longer between employees and management but between various classes of creditors. The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from

the Bankruptcy Act. When Congress came to claims for unpaid wages it did not grant all of them priority. It limited the priority to $600 for each claimant and even then only allowed it as respects wages earned within three months before the date of the commencement of the proceedings. § 64 (a)(2). We would depart from that policy if we granted the priority to one class of wage claimants irrespective of the amount of the claim or the time of its accrual. The theme of the Bankruptcy Act is "equality of distribution" (*Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215, 219); and if one claimant is to be preferred over others, the purpose should be clear from the statute. We can find in the Bankruptcy Act no warrant for giving these back pay awards any different treatment than other wage claims enjoy.

The trustee claims that the liquidation of the back pay award should not have been referred to the Board. Section 10 (c) of the National Labor Relations Act authorizes the Board, once an unfair labor practice has been found, to require, *inter alia,* the person who committed it to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The fixing of the back pay is one of the functions confided solely to the Board. At the time an order of the Board is enforced the amount of back pay is often not computed. Once an enforcement order issues the Board must work out the details of the back pay that is due and the reinstatement of employees that has been directed. This may be done by negotiation; or it may have to be done in a proceeding before the Board. The computation of the amount due may not be a simple matter. It may require, in addition to the projection of earnings which the employee would have enjoyed had he not been discharged and the computation of actual interim earnings, the determination whether the employee wilfully incurred

losses, whether the back pay period should be terminated because of offers of reinstatement or the withdrawal of the employee from the labor market, whether the employee received equivalent employment, and the like. See *Phelps Dodge Corp.* v. *Labor Board, supra,* 190 *et seq.* Congress made the relation of remedy to policy an administrative matter, subject to limited judicial review, and chose the Board as its agent for the purpose.

The bankruptcy court normally supervises the liquidation of claims. See *Gardner* v. *New Jersey,* 329 U. S. 565, 573. But the rule is not inexorable. A sound discretion may indicate that a particular controversy should be remitted to another tribunal for litigation. See *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 483. And where the matter in controversy has been entrusted by Congress to an administrative agency, the bankruptcy court normally should stay its hand pending an administrative decision. That was our ruling in *Smith* v. *Hoboken R. Co.,* 328 U. S. 123, and *Thompson* v. *Texas M. R. Co.,* 328 U. S. 134, where we directed the reorganization court to await administrative rulings by the Interstate Commerce Commission before adjudicating the controversies before it. Like considerations are relevant here. It is the Board, not the referee in bankruptcy nor the court, that has been entrusted by Congress with authority to determine what measures will remedy the unfair labor practices. We think wise administration therefore demands that the bankruptcy court accommodate itself to the administrative process and refer to the Board the liquidation of the claim, giving the Board a reasonable time for its administrative determination.

In summary, we agree with the Court of Appeals that the claim was provable by the Board and that the computation of the amount of the award was properly referred to the Board. But since we disagree with the rul-

ing on the priority of the claim we reverse the judgment and remand the cause for proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE JACKSON, with whom MR. JUSTICE BLACK joins, dissenting.

I think we should affirm the judgment below. I agree that the claim is one which can be proved in bankruptcy by the United States. The same reasoning which enables the Government to assert the claim would seem to enable it to assert the priority.

The claims which the United States asserts herein are something more than merely private indebtedness. The debtor's liability, enforceable only by the Government, is one of the most important sanctions to effectuate the policy of the National Labor Relations Act. That is one, at least, of the reasons why Congress did not see fit to leave prosecution of these usually small claims to scattered and often impecunious individual wage earners in a multiplicity of actions.

I see nothing in the policy of the Bankruptcy Act which precludes these claims, allowed in the Government's right and in its name, from sharing in the Government's general priority. Title 11, § 104 (a) sets up five levels of priority: first is administration expenses; second, wages not to exceed $600 to each claimant which have been earned within three months before commencement of bankruptcy proceedings; third, certain costs and expenses not material here; fourth, taxes legally due and owing by the bankrupt to the United States, or any state or any subdivision thereof; fifth, debts owing to any person, including the United States, who under its laws is entitled to priority.

It can hardly be questioned that Labor Board awards constitute wages or their equivalent, but beneficiaries of

these awards rarely can comply with the three-months time limitation for wage priority because of the lag occasioned by Labor Board proceedings to establish the unlawfulness of their discharge by the employer. If they could do so, their claims would doubtless take the second priority and be paid in preference to everything except administration expenses.

The judgment below denies these claims second priority but admits them to the fifth class. Ahead of them, in the fourth class, are all taxes owing to the United States and to any state or subdivision, and this obviously is the priority intended to protect the federal revenues. Only after all revenue requirements are thus satisfied does the judgment below allow these claims to be paid. The Bankruptcy Act in this fifth category certainly contemplates a class of Government claims not arising out of taxation. It does not seem to me inappropriate to consider the relation of the Government to the wronged laborer established by the Labor Relations Act as analogous to the Government's wardship toward Indians, found to warrant invocation of its priority in *Bramwell* v. *United States Fidelity Co.*, 269 U. S. 483. The slogan "equality of distribution" can have little meaning when we are considering a section of a statute designed to establish inequality by a series of priorities. To protect the bankrupt's estate against inequalities caused by the unlawful preferences attempted by the bankrupt is one thing; to invoke such a "theme" to level out priorities created by statute is another.

While the legislation is not as complete or clear as one would like, supplying the rule for conflicts unanticipated by Congress is a large part of our work and I think the courts below have arrived at a practical solution of this question that accomplishes the purposes both of the Bankruptcy Act and the National Labor Relations Act. I would therefore affirm.

UNITED STATES ET AL. v. L. A. TUCKER TRUCK LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 18. Argued October 20, 1952.—Decided November 10, 1952.

A motor carrier applied to the Interstate Commerce Commission for a certificate of convenience and necessity under § 207 (a) of the Interstate Commerce Act. Appellee intervened in opposition. The hearings were conducted by an examiner not appointed pursuant to § 11 of the Administrative Procedure Act; but appellee did not object at any stage of the administrative proceedings, although it had ample opportunity to do so. The Commission granted the certificate. Appellee petitioned a district court to set aside the Commission's action and, for the first time, challenged its validity on the ground that the examiner was not appointed pursuant to § 11 of the Administrative Procedure Act. It offered no excuse for its failure to raise the question sooner and made no claim of actual prejudice by the conduct of the examiner or the manner of his appointment. *Held:* The district court should not entertain this objection when first made at that stage of the proceedings. Pp. 34–38.

(a) The defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings. P. 38.

(b) But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity. P. 38.

(c) *Riss & Co.* v. *United States,* 341 U. S. 907, and *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, distinguished. Pp. 36–38.

100 F. Supp. 432, reversed.

The District Court set aside an order issued by the Interstate Commerce Commission under § 207 (a) of the Interstate Commerce Act, on the sole ground that the hearings on the application therefor were conducted by an examiner not appointed pursuant to § 11 of the Ad-

ministrative Procedure Act. 100 F. Supp. 432. On appeal to this Court, *reversed and remanded*, p. 38.

Edward M. Reidy argued the cause for the United States and the Interstate Commerce Commission. With him on the brief were *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp, Robert W. Ginnane* and *Charles H. Weston. Philip B. Perlman,* then Solicitor General, and *Daniel W. Knowlton,* then Chief Counsel for the Interstate Commerce Commission, were on the Statement as to Jurisdiction.

B. W. La Tourette argued the cause for appellee. With him on the brief was *G. M. Rebman.*

Mr. Justice Jackson delivered the opinion of the Court.

One Cunningham applied to the Interstate Commerce Commission for a certificate of public convenience and necessity to authorize extension of his existing motor carrier route.[1] A railroad and eleven motor carriers, including appellee, intervened to oppose. The issues were referred to an examiner who after hearing recommended that, with exceptions not material here, a certificate be granted. Appellee excepted, whereupon Division 5 of the Commission, in substance, approved the recommendation. Appellee requested reconsideration by the full Commission, which was denied, and then petitioned for "extraordinary relief," which also was refused. The Commission thereupon issued a certificate to Cunningham. Appellee, upon the ground that the evidence did not show need for the additional transportation service, petitioned the District Court to set aside the certificate and order. The Commission and the United States answered and a three-judge court was convened.

[1] 49 U. S. C. § 307.

On the day appointed for hearing, appellee moved for leave to amend its petition to raise, for the first time, a contention that the Commission's action was invalid for want of jurisdiction because the examiner had not been appointed pursuant to § 11 of the Administrative Procedure Act.[2] The District Court allowed amendment and, upon proof that the appointment had not been in accordance with that Act, invalidated the order and certificate without going into the merits of the issue tendered in the original complaint.[3] This appeal by the United States and the Interstate Commerce Commission raises but a single question—whether such an objection, first made at that stage of the proceedings, was not erroneously entertained. We hold that it was.

Appellee did not offer nor did the court require any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding. Appellee does not claim to have been misled or in any way hampered in ascertaining the facts about the examiner's appointment. It did not bestir itself to learn the facts until long after the administrative proceeding was closed and months after the case was at issue in the District Court, at which time the Commission promptly supplied the facts upon which the contention was based and sustained.

The apparent reason for complacency was that it was not actually prejudiced by the conduct or manner of appointment of the examiner. There is no suggestion that he exhibited bias, favoritism or unfairness. Nor is there ground for assuming it from the relationships in the proceeding. He did not act and was not expected to act both as prosecutor and judge. The Commission, which appointed him, did not institute or become a party in

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[2] 5 U. S. C. § 1010.

[3] 100 F. Supp. 432.

interest to the proceeding. Neither it nor its examiner had any function except to decide justly between contestants in an adversary proceeding. The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice.

In *Riss & Co.* v. *United States,* 341 U. S. 907, this Court held that officers hearing applications for certificates of convenience and necessity under § 207 (a) of the Interstate Commerce Act are subject to the provisions of the Administrative Procedure Act.[4] But timeliness of the objection was not before us, because in that case the examiner's appointment had been twice challenged in the administrative proceedings, once, as it should have been, before the examiner at the hearings and again before the Commission on a petition for rehearing. That decision established only that a litigant in such a case as this who does make such demand at the time of hearing is entitled to an examiner chosen as the Act prescribes.

We have recognized in more than a few decisions,[5] and Congress has recognized in more than a few statutes,[6]

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[4] Our decision in the *Riss* case was announced after the administrative proceeding herein, but before the District Court's hearing. *Riss* apparently prompted appellee to raise the point about the examiner's qualifications in the District Court.

[5] *Spiller* v. *Atchison, T. & S. F. R. Co.,* 253 U. S. 117, 130; *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103, 113; *United States* v. *Northern Pacific R. Co.,* 288 U. S. 490, 494; *Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U. S. 143, 155.

[6] Section 9 (a) of the Securities Act of 1933, 15 U. S. C. § 77i; § 25 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78y; § 24 of the Public Utility Holding Company Act, 15 U. S. C. § 79x; § 10 of the Fair Labor Standards Act, 29 U. S. C. § 210; § 10 (e) of the National Labor Relations Act, 29 U. S. C. § 160 (e).

that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence.[7] Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

It is argued, however, that this case falls outside of this general rule and the result below is technically compelled because, if the appointment of the hearing examiner was irregular, the Commission in some manner lost jurisdiction and its order is totally void. This inference is drawn from our decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, for it is contended we could not have sustained a collateral attack by writ of habeas corpus in that case unless we found the defect in that examiner's appointment to be one of jurisdictional magnitude. We need

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[7] The Government informs us that in about five thousand cases commenced after the effective date of the Administrative Procedure Act, orders are for an indefinite period vulnerable to attack if no timely objection during the administrative process is required. The policy of the Commission is to grant application for rehearing in cases where applicant made the objection before the examiner. Since its established practice is not to consider issues not raised before the examiner, it will refuse rehearings in other cases.

not inquire what should have been the result upon that case had the Government denied or the Court considered whether the objection there sustained was taken in time. The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point.[8] Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.[9]

The question not being foreclosed by precedent, we hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity.

The judgment is reversed and the cause remanded to the District Court for determination on the merits.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

Were we dispensing what is complacently called oriental justice, according to which the merits of the individual case alone, so one is told, determine the result, I would join my brethren in reversing this judgment. For I see no reason to disagree with the Court's view that in this case non-compliance by the Interstate Commerce Commission with the requirements of the Administrative

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[8] *Webster* v. *Fall*, 266 U. S. 507.

[9] *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170.

Procedure Act did not prejudice the appellee. Nor do I deny that some rights personal to a party may be waived, either explicitly or by failure to assert them.

But I find no explicit waiver here, nor is it clear to me how the appellee can be charged with knowledge of the official status of the examiner on the basis of whose report the Commission took action adverse to it. In any event, the requirement of the Administrative Procedure Act that proceedings which lead to an administrative adjudication must be conducted by an independent hearing examiner is not something personal to a party. It is a requirement designed to assure confidence in the administrative process by defining and limiting the various organs through which that process is allowed to function.

I do not use the term "jurisdiction" because it is a verbal coat of too many colors. But we are dealing with legislation which sought to remedy what were believed to be evils in the way in which administrative agencies exercised their authority prior to the enactment of the Administrative Procedure Act of June 11, 1946. That Act accordingly prohibited the commingling of the conflicting functions exercised by these agencies. I do say, therefore, that it created unwaivable limitations upon the power of these agencies, as much so as do the definitions in judiciary acts of the different categories of cases which different courts are empowered to hear and decide. The limitations upon the power of the Interstate Commerce Commission to act, imposed by the command that it must do so only in accordance with the requirements of the Administrative Procedure Act, are thus not within the dispensing power of any litigant. They bind and confine the Commission itself.

I cannot otherwise read what we decided in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, and *Riss & Co., Inc.* v. *United States,* 341 U. S. 907. I do not rest my conclusion on any assumption of jurisdiction *sub silentio* in the *Wong*

Yang Sung case. What I am resting on is the significance we attached to the requirement of independent hearing examiners as inherent in the process of administrative adjudication.

After we decided *Wong Yang Sung* v. *McGrath, supra,* Congress was promptly asked to relieve the deportation process of this requirement and it did so. See Chapter III of the Supplemental Appropriation Act, 1951 (Act of September 27, 1950, 64 Stat. 1044, 1047). After we made the same ruling as to the Interstate Commerce Commission, Congress was promptly asked to validate proceedings previously conducted by the Commission in disregard of the requirements for independent hearing examiners. Congress has chosen not to enact such remedial legislation.[1] I do not construe this want of action as controlling upon the issue before us. I refer to this subsequent legislative history merely as an indication of the path by which undesirable consequences flowing from our decision in *Riss & Co., Inc.* v. *United States, supra,* may be corrected without injustice. Situations like this arise from time to time when decisions of this Court in the observance of law suggest corrective legislation. See, *e. g., United States* v. *Heinszen & Co.,* 206 U. S. 370.

MR. JUSTICE DOUGLAS, dissenting.

This decision gives a capricious twist to the law. One would assume from a reading of the opinion in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, that the failure of a federal agency to use the type of examiner prescribed by Congress in the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.,* vitiated the proceedings whether objection was raised or not. The Congress de-

[1] A remedial bill was successful in the House but failed in the Senate. The bill was H. R. 5045. See H. R. Rep. No. 1637, 82d Cong., 2d Sess.

cided to separate the judicial functions of examiners from the investigative and prosecuting functions. It required the separation in cases involving property interests as well as those involving personal liberty. It condemned as unfair a practice which had grown up of allowing one man to be the police officer, the prosecutor, and the judge.

Violation of that requirement led the Court in *Wong Yang Sung's* case to issue a writ of habeas corpus to save an alien from deportation where the hearing examiner did not meet the requirements of the Administrative Procedure Act. That was a collateral attack on the administrative proceeding, successfully made even though no objection to the examiner was raised at the hearing.*

The objection raised in the present case likewise was not made at the hearing; but it was made before review of the order had been completed. It would seem, therefore, that reversal of this administrative order would follow *a fortiori* from *Wong Yang Sung's* case.

No one knows how the commingling of police, prosecutor and judicial functions in one person may affect a particular decision. In some situations it might make no difference; in others it might subtly corrupt the administrative process. The only important consideration for us is that Congress has condemned the practice; and we as supervisors of the federal system should see to it that the law is enforced, not selectively but in all cases coming before us.

Of course, an agency that flouts the mandate for fair examiners does not lose jurisdiction of the case. Even habeas corpus is no longer restricted to the testing of "jurisdiction" in the historic sense. See *Johnson* v. *Zerbst,* 304 U. S. 458, 467; *Bowen* v. *Johnston,* 306 U. S.

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*And the alien in that case, like the respondent here, was represented by counsel in the administrative proceedings.

19, 24. But the action of the Commission in the present case created an error that permeates the entire proceeding. It is error that goes to the very vitals of the case. I would therefore set aside the order and send the case back for a hearing that meets the statutory standards of fairness. I would make the rule of *Wong Yang Sung's* case good for more than the day and the occasion.

UNITED STATES *v.* BEACON BRASS CO., INC. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 30. Argued October 23, 1952.—Decided November 10, 1952.

A willful attempt to evade or defeat taxes by making false statements to Treasury representatives violates § 145 (b) of the Internal Revenue Code, 26 U. S. C. § 145 (b), and is not punishable exclusively under § 35 (A) of the Criminal Code, 18 U. S. C. § 1001, which outlaws the willful making of false statements "in any matter" within the jurisdiction of any department or agency of the United States. Pp. 43–47.

106 F. Supp. 510, reversed.

The District Court dismissed an indictment under § 145 (b) of the Internal Revenue Code, 26 U. S. C. § 145 (b), on the ground that it failed to charge an offense thereunder. 106 F. Supp. 510. On direct appeal to this Court under 18 U. S. C. § 3731, *reversed,* p. 47.

Marvin E. Frankel argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Acting Assistant Attorney General Lyon, Ellis N. Slack* and *Melva M. Graney. Philip B. Perlman,* then Solicitor General, was on the Statement as to Jurisdiction.

Richard Maguire argued the cause and filed a brief for appellees.

MR. JUSTICE MINTON delivered the opinion of the Court.

On March 16, 1951, a one-count indictment was returned in the United States District Court for the District of Massachusetts against the appellees, Beacon Brass Company, a corporation, and Maurice Feinberg, its

president and treasurer. The indictment charged that in violation of § 145 (b) of the Internal Revenue Code, 40 Stat. 1085, as amended, 26 U. S. C. § 145 (b), the appellees had willfully attempted to evade taxes by making false statements to Treasury representatives on October 24, 1945, "for the purpose of supporting, ratifying, confirming and concealing the fraudulent and incorrect statements and representations made in the corporate tax return of said Beacon Brass Co., Inc., for the fiscal period ending October 31, 1944, filed on or about January 5, 1945 . . . ." Section 145 (b) provides in pertinent part:

> "[A]ny person who willfully attempts *in any manner* to evade or defeat any tax imposed by this chapter or the payment thereof, shall, *in addition to other penalties provided by law,* be guilty of a felony . . . ." (Emphasis supplied.)

The six-year limitation period, 43 Stat. 341, 342, as amended, 26 U. S. C. § 3748 (a)(2), applicable to offenses under this statute, had expired on a charge for filing a false tax return in January 1945, but it had not expired on a charge of making false statements to Treasury employees in October 1945. The District Court viewed the indictment as charging the separate crimes of filing a false return and making subsequent false statements to Treasury representatives, and dismissed the indictment as duplicitous.

On September 14, 1951, a second indictment was returned against the appellees which repeated the charge that in violation of § 145 (b) they "did wilfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the said corporation . . . by making certain false and fraudulent statements and representations, at a hearing and conference before representatives and employees of the United States Treasury

Department, on or about October 24, 1945 . . . ." Reference to the allegedly false return filed in January 1945 was omitted, and instead it was charged that the false statements were made "for the purpose of concealing additional unreported net income . . . ."

Section 35 (A) of the Criminal Code, 18 U. S. C. (1946 ed.) § 80 (now 18 U. S. C. (Supp. V) § 1001) makes it unlawful to "knowingly and willfully . . . make . . . any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States . . . ." Obviously, at the times of the indictments here, the three-year limitation period, 18 U. S. C. (Supp. V) § 3282, for violations of this statute had expired as to statements made in October 1945. The District Court concluded that since § 35 (A) deals specifically with false statements, Congress must be presumed to have intended that the making of false statements should be punishable *only* under § 35 (A). Therefore, the District Court dismissed the indictment on the ground that it failed to charge an offense under 26 U. S. C. § 145 (b). 106 F. Supp. 510. We noted probable jurisdiction of the United States' appeal taken under authority of 18 U. S. C. (Supp. V) § 3731.

We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. *United States* v. *Noveck,* 273 U. S. 202, 206; *Gavieres* v. *United States,* 220 U. S. 338. Unlike § 35 (A), § 145 (b) requires proof that the false statements were made in a willful effort to evade taxes. The purpose to evade taxes is crucial under this section. The language of § 145 (b) which outlaws willful attempts to evade taxes "in any manner" is clearly broad enough to include false statements made to Treasury representatives

for the purpose of concealing unreported income. Cf. *Spies* v. *United States,* 317 U. S. 492, 499. The question raised by the decision below is whether by enacting a statute specifically outlawing all false statements in matters under the jurisdiction of agencies of the United States, Congress intended thereby to exclude the making of false statements from the scope of § 145 (b).

We do not believe that Congress intended to require the tax-enforcement authorities to deal differently with false statements than with other methods of tax evasion. By providing that the sanctions of § 145 (b) should be "in addition to other penalties provided by law," Congress recognized that some methods of attempting to evade taxes would violate other statutes as well. See *Taylor* v. *United States,* 179 F. 2d 640, 644. Moreover, since no distinction is made in § 35 (A) between written and oral statements, the reasoning of the court below would be equally applicable to false tax returns which are, of course, false *written* statements. But the Courts of Appeals have uniformly applied § 145 (b) to attempts to evade taxes by filing false returns. *E. g., Gaunt* v. *United States,* 184 F. 2d 284, 288; *Taylor* v. *United States, supra,* at 643–644. Further support for our conclusion can be found in *United States* v. *Noveck, supra,* where this Court rejected the contention that the enactment of § 145 (b) impliedly repealed the general perjury statute insofar as that statute applied to false tax returns made under oath. Cf. *United States* v. *Gilliland,* 312 U. S. 86, 93, 95–96. Finally, the enactment of other statutes expressly outlawing false statements in particular contexts, *e. g.,* 18 U. S. C. (Supp. V) §§ 1010, 1014, negates the assumption—which was the foundation of the decision of the court below—that Congress intended the making of false statements to be punishable only under § 35 (A).

The appellees contend that the acts charged constitute only one crime of tax evasion which was complete when

the allegedly false tax return was filed. On the basis of this contention, appellees seek to sustain the decision below on the grounds that the six-year statute of limitations had run, and that the dismissal of the first indictment is *res judicata* and a bar to the second indictment for the same offense. We do not consider these questions because our jurisdiction on this appeal is limited to review of the District Court's construction of the statute in the light of the facts alleged in the indictment. 18 U. S. C. (Supp. V) § 3731; *United States* v. *Borden Co.,* 308 U. S. 188, 206–207.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Black is of the opinion that the District Court reached the right result and would affirm its judgment.

JOHNSON, ADMINISTRATRIX, *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 40. Argued October 23–24, 1952.—Decided November 17, 1952.

At the close of the evidence in a suit in a federal district court under the Jones Act for wrongful death, defendant moved to dismiss the complaint and for a directed verdict in its favor. The court reserved decision on the motion and submitted the case to the jury. A verdict was returned for plaintiff and judgment was entered thereon. Within ten days after reception of the verdict, defendant moved to have it set aside, but did not move for judgment notwithstanding the verdict. The court denied plaintiff's motion to set aside the verdict and denied the pre-verdict motions for dismissal and for a directed verdict. On appeal, the Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment of the district court. *Held:* Under Rule 50 (b) of the Federal Rules of Civil Procedure, the Court of Appeals could not direct entry of a judgment for defendant notwithstanding the verdict. Pp. 49–54.

(a) In the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of the verdict, Rule 50 (b) forbids the trial judge or an appellate court to enter such a judgment. P. 50.

(b) Defendant's motion to set aside the verdict cannot be treated as a motion to enter judgment notwithstanding the verdict. Pp. 50–51.

(c) The trial judge's express reservation of decision on the motion for a directed verdict did not relieve defendant from the duty under Rule 50 (b) to make a motion after the verdict for judgment notwithstanding the verdict. Pp. 51–54.

(d) Defendant is entitled only to a new trial, not to a judgment in its favor. P. 54.

194 F. 2d 194, judgment vacated and cause remanded.

In a suit under the Jones Act, 46 U. S. C. § 688, for wrongful death, the District Court rendered judgment for the plaintiff. The Court of Appeals reversed. 194 F. 2d

194. This Court granted certiorari. 343 U. S. 975. *Judgment vacated and cause remanded,* p. 54.

Jacquin Frank argued the cause for petitioner. With him on the brief was *Herman B. Gerringer.*

Robert M. Peet argued the cause for respondent. With him on the brief was *Edward R. Brumley.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises questions concerning the power of a Court of Appeals to render judgment for a defendant instead of merely ordering a new trial after it has set aside a jury verdict and trial court judgment for a plaintiff.

The petitioner sued the respondent railroad under the Jones Act, 46 U. S. C. § 688, for wrongful death of her husband. When the evidence was all in, the railroad moved to dismiss the complaint and also asked for a directed verdict in its favor on the grounds that no negligence had been proven and that the deceased had been responsible for his own death. The trial court reserved decision on the motion, submitted the case to the jury, a verdict of $20,000 was returned for petitioner, and judgment was entered on the verdict. Within ten days after reception of the verdict the railroad moved to have the verdict set aside on the ground that it was excessive, contrary to the law, to the evidence, to the weight of the evidence. More than two months later this motion was denied; in the same order denying that motion the court also denied the pre-verdict motions for dismissal and for a directed verdict on which action had been reserved prior to verdict. Holding that the motion for a directed verdict should have been granted, the Court of Appeals reversed. 194 F. 2d 194. Both parties agree that this reversal requires the District Court to enter judgment for the railroad notwithstanding the verdict,

thereby depriving petitioner of another trial. Whether the Court of Appeals could direct such a judgment consistently with Rule 50 (b) of the Federal Rules of Civil Procedure [1] is the single question we granted certiorari to review. 343 U. S. 975.

On several recent occasions we have considered Rule 50 (b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212. We repeated that construction of the rule in *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, and reemphasized it in *Fountain* v. *Filson*, 336 U. S. 681.

Although this respondent made several motions it did not as the rule requires move within ten days after verdict "to have judgment entered in accordance with his [its] motion for a directed verdict." We are told, however, in respondent's brief that its motion to set aside the verdict "was intended to be a motion for judgment in its favor or for a new trial" and that "[o]bviously respondent did not merely want the verdict to be set aside but wanted the relief that invariably follows such a setting aside on the grounds urged: a judgment in its favor or a new

[1] "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. . . ."

trial." The defect in this argument is that respondent's motions cannot be measured by its unexpressed intention or wants. Neither the trial judge nor the Court of Appeals appears to have treated the motion to set aside the verdict as asking for anything but that. And surely petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of respondent's counsel. Respondent's motion should be treated as nothing but what it actually was, one to set aside the verdict—not one to enter judgment notwithstanding the verdict.

Respondent separately argues that a trial judge's express reservation of decision on motion for a directed verdict relieves a party from any duty whatever under 50 (b) to make a motion for judgment after verdict. This contention not only flies in the teeth of the rule's unambiguous language but if sustained would undermine safeguards for litigants some of which have been pointed out in prior cases. The rule carefully sets out the steps and procedures to be followed by the parties as a prerequisite to entry of judgments notwithstanding an adverse jury verdict. *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 250. It was adopted following confusion in this field brought about in part by three cases decided by this Court, *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364; *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U. S. 654; and *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389. The *Slocum* case was understood to hold that the Seventh Amendment forbade United States courts to enter judgments in favor of one party after jury verdict in favor of the other. The *Redman* case tried in New York held that the Seventh Amendment did not forbid entry of judgment notwithstanding a verdict where, prior to the verdict, the trial judge, following New York procedure, had expressly reserved his decision on a motion for a directed verdict. The New York District Court was au-

thorized to follow this state practice because of the Conformity Act, R. S. (1878) § 914. Thus the *Redman* case did not purport to adopt New York procedure for the general guidance of federal courts. Later the *Kennedy* case cast doubt on the *Redman* holding, at least as to its scope. In the *Kennedy* case plaintiff's request for directed verdict had not been followed by a timely motion for judgment notwithstanding the verdict as required by Pennsylvania law. Failure to conform to this Pennsylvania practice was a reason given by this Court for finding lack of power in the District Court to enter judgment contrary to the verdict.[2]

Rule 50 (b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts. State procedure was no longer to control federal courts as it had in the *Redman* and *Kennedy* cases. Federal courts were to be guided by this new rule, which provided its own exclusive procedural program. It rejected the New York procedure applied in the *Redman* case, which permitted judgment to be set aside even though no motion to do so had been filed after verdict. Instead it approached more closely the Pennsylvania rule, relied

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[2] The controlling Pennsylvania statute then was Pa. Laws 1905, No. 198. Like Rule 50 (b) it provided for a timely motion for judgment notwithstanding the verdict. The binding duty to do this was explained by the Supreme Court of Pennsylvania as follows, in a case relied on by this Court in the *Kennedy* case:

"To secure the benefit of that act its terms must be complied with, that is, the refusal of the request for binding instructions must be followed by a proper motion made in due time: Pyle v. Finnessy, 275 Pa. 54, 57. Here the record as duly certified discloses no such motion nor any evidence that one was made. True, the question of the absence of such motion was not raised in the lower court but, being one of jurisdiction, it cannot be ignored. It follows that as the record stands the judgment cannot be sustained." *West* v. *Manatawny Mut. F. & S. Ins. Co.*, 277 Pa. 102, 104, 120 A. 763, 764.

on in the *Kennedy* case, under which judgments contrary to verdicts would not be awarded in the absence of specific timely motions for them. But Rule 50 (b) departed from the New York and Pennsylvania procedures by making it wholly unnecessary for a judge to make an express reservation of his decision on a motion for directed verdict. The rule itself made the reservation automatic. A court is always "deemed to have submitted the action to the jury subject to a later determination" of the right to a directed verdict if a motion for judgment notwithstanding the verdict is made "within 10 days after the reception of a verdict . . . ." This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the post-verdict movant and thus emphasizes the importance of the legal issues. The movant can also ask for a new trial either for errors of law or on discretionary grounds. The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. See *Cone* v. *West Virginia Pulp & Paper Co., supra,* at 217–218. Poor support for its abandonment would be afforded by the mere fact that a judge makes an express reservation of a decision which the rule reserves regardless of what the judge does.

Rule 50 (b) as written and as construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and intentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end. In 1946 this Court was asked to adopt an amendment to the rule which would have given appellate courts power to enter judgments for parties who, like this respondent, had made no timely motion for judgment notwithstanding the verdict. We did not adopt the amendment then. 5 Moore, Federal Practice (2d ed. 1951), ¶¶ 50.01 [7], 50.01 [9], 50.11.

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No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation.

Respondent made a motion to set aside the verdict and for new trial within the time required by Rule 50 (b). It failed to comply with permission given by 50 (b) to move for judgment *n. o. v.* after the verdict. In this situation respondent is entitled only to a new trial, not to a judgment in its favor. The judgment of the Court of Appeals is vacated and the cause is remanded to it for further proceedings consistent with this opinion.[3]

It is so ordered.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON, MR. JUSTICE BURTON and MR. JUSTICE MINTON join, dissenting.

If the Court's opinion in this case merely disposed of a particular litigation by finding error in a decision of the

[3] The writer of this opinion and THE CHIEF JUSTICE are not convinced that the Court of Appeals attempted to direct a verdict for the railroad. What the court said was: "In our opinion the motion for a directed verdict should have been granted. Accordingly the judgment is reversed." But holding that a directed verdict should have been given cannot be the equivalent of a court's entry of judgment for defendant notwithstanding a jury verdict for plaintiff. For after setting aside a verdict as authorized by Rule 50 (b), a trial judge may "either" enter a judgment contrary to the verdict "or" order a new trial. The rule thereby requires the exercise of an informed judicial discretion as a condition precedent to a choice between these two alternatives. *Cone* v. *West Virginia Pulp & Paper Co., supra,* at 215. And this discretion must be exercised by the court, not by its clerk. The Court was told during oral argument that it is the practice in the Second Circuit for the clerk to include in his mandate a direction to the district court to have a judgment entered in favor of a party notwithstanding the verdict where the court reverses a district court's refusal to direct a verdict. A rule of practice of this kind under which a court clerk's mandate would automatically direct entry of a judgment for defendant after court reversal of a plaintiff's judgment could not possibly be the result of

Court of Appeals that a judgment be entered for the defendant in a negligence suit, an expression of dissent, let alone a dissenting opinion, would not be justified. If that were all there were to it, neither would the Court have been justified in granting the petition for certiorari. The same considerations which made the case one of general importance for review here make it appropriate to spell out the grounds of dissent.

Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation. That is what is involved in this case. The immediate issue is the construction of one of the important Rules of Civil Procedure. That construction in turn depends upon our basic attitude toward those Rules—whether we take their force to lie in their very words, treating them as talismanic formulas, or whether we believe they are to be applied as rational

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the kind of judicial discretion directed by Rule 50 (b). We are not willing to attribute such a practice to the Second Circuit. The Second Circuit's Rules of Practice do not prescribe a practice of that kind. See F. C. A., Rules, c. 5, pp. 96–103, 16 S. Ct. Dig. 143–169, U. S. Dig., Court Rules (L. Ed.), pp. 573–589. Nor do the rules of any other circuit. See F. C. A., Rules, cc. 4–13, pp. 84–194, 16 S. Ct. Dig. 107–523, U. S. Dig., Court Rules (L. Ed.), pp. 545–827. No case has been found that indicates such a practice by the Second or any other Circuit. Since adoption of Rule 50 (b) in 1938, courts of appeals wishing to enter or direct judgment have said so in clear, simple and mandatory language. As to the Second Circuit, see *e. g., Venides* v. *United Greek Shipowners Corp.*, 168 F. 2d 681; *Brennan* v. *B. & O. R. Co.*, 115 F. 2d 555; *Williams* v. *New Jersey-N. Y. Transit Co.*, 113 F. 2d 649; *Conway* v. *O'Brien*, 111 F. 2d 611. The Fifth Circuit emphatically pointed out that mere reversal and remand for proceedings consistent with the opinion did not authorize a trial court to enter judgment notwithstanding the verdict; entry of such a judgment was only to be granted as of discretion and after a hearing. *Fleniken* v. *Great American Indemnity Co.*, 142 F. 2d 938; see also *In re Mutual Life Ins. Co. of New York*, 188 F. 2d 424, 425–426.

instruments for doing justice between man and man in cases coming before the federal courts.

Our concern is with Rule 50 (b) of the Federal Rules of Civil Procedure.[1] The Rules became effective on September 16, 1938. Two years later, in *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, this Court was called upon to determine the appropriate procedure under Rule 50 (b). To do so, the Court had to consider the experience that led to the promulgation of the Rule. Its aim was to speed litigation without prejudicing the legitimate interests of litigants; to see to it that full and fair consideration is given to the issues litigants raise but that litigation does not become a socially wasteful game. The unanimous opinion of the Court in the *Montgomery Ward* case gave this guiding direction: ". . . the courts should so administer the rule as to accomplish all that is permissible under its terms." 311 U. S., at 253. This attitude was made specific by the statement that if the trial judge rules, as he properly

[1] "(b) RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

should, on alternative motions for judgment *n. o. v.* and for a new trial, and denies them both, the appellate court may reverse the former action and direct the entry of judgment *n. o. v.* 311 U. S., at 254.

Subsequent to *Montgomery Ward & Co.* v. *Duncan, supra,* three cases came here in which we reversed because Courts of Appeals disregarded the procedure outlined in that case in one significant respect. The Courts of Appeals directed the entry of judgments *n. o. v.* although no motions for such judgments had been made in the trial courts. *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U. S. 212; *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571; *Fountain* v. *Filson,* 336 U. S. 681. Our decisions do not suggest, however, that the party in whose favor a Court of Appeals directs a judgment *n. o. v.* is required to use a ritualistic formula in the District Court. The only relevant inquiry in this case, therefore, is whether the fair meaning of the proceedings after a verdict was rendered in fact constituted disposition of a motion to enter judgment *n. o. v.* This is so unless Rule 50 (b) commands that after the reception of a verdict a party must not only "move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict," but must do so by a particular form of words. The Rule does not require this. Nothing in the Rule, either by its terms or its origin, requires some abracadabra of obedience to it.

A comparison of the facts in the *Cone, Globe* and *Fountain* cases with those in this case leaves no doubt that this case has nothing in common with *Cone, Globe* and *Fountain.* A tabular analysis of the procedural facts in all four cases is appended, *post,* p. 63. There were no motions *n. o. v.* in *Cone, Globe* and *Fountain,* and the failure to make them resulted in a prejudice to the losing

parties in the Courts of Appeals in those three cases which is wholly wanting here.[2]

In each of the three earlier cases the decision of the Court of Appeals either applied to the facts a legal theory other than the one on which the parties proceeded in the trial court, or for the first time assigned decisive importance to the choice by the losing party of a legal theory on which to claim or resist recovery. *Cone* was tried on the assumption that proof of constructive possession would sustain the cause of action; the Court of Appeals definitively disposed of the litigation by holding that actual possession must be proved. In *Globe* the plaintiff secured a verdict on the basis of an express warranty in a sale; the Court of Appeals held that he had failed in this and directed the entry of a judgment for the seller, even though on a new trial, which alone was what the seller had asked, it would have been open for the buyer, with the aid of additional evidence, to succeed on proof of an implied warranty. In *Fountain* the plaintiff sued to have himself declared the beneficiary of a resulting

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[2] The post-verdict motions in *Cone* and *Globe* (there was none in *Fountain*) specifically prayed for a new trial, and the grounds they recited went wholly to the issue of whether or not a new trial would be proper. The *Cone* motion relied on newly discovered evidence. Moreover, it was much too late to pray for judgment *n. o. v.* under Rule 50 (b). In *Globe* the motion claimed error in rulings on evidence and in taking the case from the jury. The motion in our case, timely under Rule 50 (b), was "to set aside the verdict" on grounds which supported both judgment *n. o. v.* and the grant of a new trial. Having heard argument and requested briefs and the trial transcript, the judge held that the evidence permitted recovery. It could not do so, of course, if it were insufficient in law. Nor should the fact be forgotten that the judge was dealing with arguments which had been presented to him before on a motion for a directed verdict, as to which he had reserved decision. Motions for directed verdict had been made by defendants in *Cone* and *Globe* as well, but they had been expressly denied before the verdict.

trust in certain realty. While the Court of Appeals agreed with the District Court that New Jersey law precluded the imposition of such a resulting trust, it directed the District Court to enter a personal money judgment for the plaintiff. In all three cases we held that the District Court never had opportunity to exercise the discretion which would have been open to it had the grounds on which the litigation went off in the Court of Appeals been relied on before the District Court in an appropriate motion.

In this case there was no such deviation from the trial issues. The case went to the jury on the issues of defendant's negligence in departing from an alleged common custom, and of causation. These issues were duly pressed before the trial judge after verdict. The case went against the petitioner in the Court of Appeals on one of them. In contrast to the situation in the other three cases no possible claim of surprise can here find nourishment. The *Cone, Globe* and *Fountain* cases, being decisively different from this case, cannot govern it.

Let me set out, side by side, so much as is pertinent in the motion made after the verdict in the *Montgomery Ward* case and the motion made in this case.

Montgomery Ward

Comes the defendant, Montgomery Ward & Company, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the defendant notwithstanding the verdict, and its motion for a new trial in the alternative, and as grounds therefor states:

Johnson

On behalf of the defendant, The New York, New Haven & Hartford Railroad, I move to set aside the verdict on the ground

Montgomery Ward	*Johnson*
A. . . . Motion . . . to enter judgment	
1. That the verdict is contrary to the law.	that it is contrary to the law
2. That the verdict is contrary to the evidence.	and contrary to the evidence
3. That the verdict is contrary to the law and evidence.	
. . . . .	
8. That the defendant has failed to prove by a preponderance of the evidence	and contrary to the weight of the evidence
B. . . . motion for a new trial: [Specifications 1–8 same as above.]	
9. That the damages found by the jury and the verdict based thereon were excessive.[3]	and excessive.

The difference between the two motions is nil. One was written and formally labelled and detailed. While the other was oral, it was cast in form familiar to New York practitioners and its meaning was no less clear. The District Judge's action demonstrates this. But under the Court's holding it is no longer sufficient to move for a directed verdict and then, within the time provided by the Rule, ask the trial judge either to grant judgment or a new trial. The Court so holds even though the trial judge already has expressly stated he has reserved for his consideration at that time (after verdict) the very issue which a motion for judgment *n. o. v.* would repeat. The

[3] The specifications which I do not quote do not add materially to the motion for judgment *n. o. v.* in the *Montgomery Ward* case.

obvious, which is left unsaid in colloquies between counsel and the court, must now be spoken. The redundant, omitted out of respect for a judge's intelligence and professional competence, must always be spelled out. The parties must be sure to indulge the ancient weakness of the law for stylized repetition, and it is necessary that the judge answer the same question twice before his answer is to be recognized. In this way do we conduce "to the efficiency and the economy of the administration of justice." Federal Rules of Civil Procedure, Proceedings of the Institute at Washington, D. C. and of the Symposium in New York City, 87 (1938) (Chesnut, J.).

If on that fateful Friday the 13th, in April, 1951, sometime shortly after 10:30 in the morning when the jury's verdict was opened, the defendant had prefaced his argument by saying, "Your Honor, before addressing myself to my pending motion for directed verdict, on which your Honor reserved decision, and which of course now necessarily is a motion for judgment *n. o. v.,* I first want to renew that motion," he would have avoided today's decision against him, although he would not have added one jot of information to that of counsel for the plaintiff or of the judge regarding the issues before the court for decision. To require this is to make Rule 50 (b) read (added language in italics):

> "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside. *Such a motion will be treated as a motion to have judgment entered in accordance with his motion for a directed verdict if he repeats the motion for directed verdict or states to the court that he now makes a 'motion for judgment notwithstanding the verdict.'* "

The Federal Rules of Civil Procedure are the product of the progress of centuries from the medieval court-room contest—a thinly disguised version of trial by combat—to modern litigation. "Procedure is the means; full, equal and exact enforcement of substantive law is the end." Pound, The Etiquette of Justice, 3 Proceedings Neb. St. Bar Assn. 231 (1909). This basic consideration underlies the Rules; with it in mind we construed Rule 50 (b) in the *Montgomery Ward* case.

It has been said of the great Baron Parke: "His fault was an almost superstitious reverence for the dark technicalities of special pleading, and the reforms introduced by the Common Law Procedure Acts of 1854 and 1855 occasioned his resignation." (Sir James Parke, 15 D. N. B. 226.)

Baron Parke despaired prematurely. If he had waited another hundred years this Court today would have vindicated his belief that judges must be imprisoned in technicalities of their own devising, that obedience to lifeless formality is the way to justice.

[For dissenting opinion of MR. JUSTICE MINTON, see *post*, p. 65.]

	Cone v. *W. Va. P. & P. Co.* 330 U. S. 212	*Globe Co.* v. *San Roman* 332 U. S. 571	*Fountain* v. *Filson* 336 U. S. 681	*Johnson* v. *N. Y., etc. Co.*
CAUSE OF ACTION.	Trespass.	Contract.	Resulting trust.	Wrongful death—Jones Act.
TRIAL ISSUES.	Title and possession.	Existence of contract and express warranty.	Existence of resulting trust under deed and option.	Existence of common custom, and causation.
PRE-VERDICT MOTIONS.	For directed verdict, by defendant. Denied.	For directed verdict, by defendant. Denied. For directed verdict, by plaintiff. Granted.	For summary judgment, by defendant. Granted.	For directed verdict, by defendant. Decision reserved.
JUDGMENT.	For plaintiff.	For plaintiff.	For defendant.	For plaintiff.
POST-VERDICT MOTIONS.	For new trial, by defendant; denied. No motion for judgment *n. o. v.*	For new trial, by defendant; denied. No motion for judgment *n. o. v.*	None.	To set aside the verdict, by defendant; denied on ground that evidence sufficient to support cause of action.
TIME ELAPSED BETWEEN JUDGMENT AND MOTION.	62 days.	8 days.		Motion made immediately after verdict.
DISPOSITION IN C. A.	District Court directed to enter judgment for defendant. 153 F. 2d 576.	District Court directed to enter judgment for defendant. 160 F. 2d 800.	District Court directed to enter judgment for plaintiff. 171 F. 2d 999.	District Court directed to enter judgment for defendant. 194 F. 2d 194.
DISPOSITION HERE.	Reversed. Trial judge must be given chance to exercise discretion to enter judgment *n. o. v.* or grant a new trial.	Reversed. *Cone* case governs.	Reversed. C. A. judgment entered "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." 336 U. S. at 683.	

MR. JUSTICE MINTON, dissenting.

I agree with all that MR. JUSTICE FRANKFURTER has said in upholding the action of the Court of Appeals in returning the case to the District Court with directions to enter a verdict for the defendant. I would add another reason why I think the action was valid.

After the *Cone, Globe Liquor* and *Fountain* cases were decided, Congress in 1948 revised the Judicial Code, and in 28 U. S. C. § 2106 clearly authorized the action taken by the Court of Appeals here. Section 2106 reads as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

To me, this statute is controlling. We found it controlling of the action of the Court of Appeals in a criminal case. *Bryan* v. *United States,* 338 U. S. 552. MR. JUSTICE BLACK, who now speaks for the Court, dissented in the *Bryan* case because he thought *Cone* controlling. By act of Congress, the discretion now rests with the Court of Appeals to grant a new trial or to direct a verdict according to law on the record already made.

UNITED STATES *v.* HENNING ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 10. Argued April 1, 1952.—Reargued October 14, 1952.—Decided November 17, 1952.

An insured under a policy of National Service Life Insurance who had designated his father as sole beneficiary, died in active service in July 1945. Five months later the father died, and four years later the father's second wife (the insured's stepmother) died. Neither had received any part of the policy's proceeds. The insured's natural mother survived. The District Court found that the stepmother had stood *in loco parentis* to the insured for at least one year prior to his entry into active service, and also that, within the meaning of § 602 (h) (3) (C) of the National Service Life Insurance Act, both the stepmother and the natural mother "last bore" the parental relationship to the insured. *Held:*

1. Installments of the proceeds of the policy which, though accrued, had not been received by a beneficiary prior to his death, cannot be awarded to the estate of such deceased beneficiary, since § 602 (i) conditions payments on the beneficiary's *being alive to receive* them. Pp. 69–76.

2. The insured's natural mother is a surviving beneficiary entitled to take by devolution under § 602 (h) (3) (C) of the Act. Pp. 76–78.

(a) The finding that the stepmother "last bore" the parental relationship to the insured, within the meaning of § 602 (h) (3) (C), does not preclude a finding that the insured's natural mother also "last bore" that relationship. Pp. 76–77.

(b) This Court accepts what the courts below deemed a continuing parental relationship between the insured and his natural mother. Pp. 77–78.

(c) Since the insured's natural mother is a surviving beneficiary entitled to take by devolution under § 602 (h) (3) (C), she is the "beneficiary to whom payment is first made," within the meaning of § 602 (h) (1) and (2). Pp. 77–78.

3. Since there is a surviving beneficiary entitled to take by devolution under § 602 (h) (3) (C), the Government may not in-

voke the provisions of § 602 (j) to withhold, for the benefit of the National Service Life Insurance Fund, payment of the installments accrued from the date of the insured's death. P. 78.
191 F. 2d 588, reversed.

In an action for a judicial determination of the proper beneficiary under a policy of National Service Life Insurance, the District Court divided the proceeds among three parties. 93 F. Supp. 380. The Court of Appeals agreed. 191 F. 2d 588. This Court granted certiorari. 342 U. S. 917. *Reversed,* p. 78.

Morton Liftin argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade.*

Richard H. Lee argued the cause for Kennedy, Administrator, respondent. With him on the brief was *Arthur V. Getchell.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Conflicting claims to the proceeds of a policy of National Service Life Insurance frame the controversy before us. Disposition of the cause depends on our interpretation of the National Service Life Insurance Act of 1940, as amended, 38 U. S. C. § 801 *et seq.,* which in pertinent part [1] provides:

> § 602 (g). "The insurance shall be payable only to a widow, widower, child . . ., parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided . . . ."

[1] In 1946, the Act was amended prospectively in several material respects. 60 Stat. 781 *et seq.* Since the policy before us matured in 1945, the 1946 amendments do not govern the distribution of the proceeds here in issue.

§ 601 (f). "The terms 'parent', 'father', and 'mother' include a father, mother, father through adoption, mother through adoption [and] persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year . . . ."

§ 602 (i). "If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h)(3) of this section and the insurance shall be payable in equal monthly installments in accordance with subsection (h) . . . . The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h) . . . ."

§ 602 (h)(3). "Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—

. . . . . .

"(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares; . . . ."

§ 602 (j). "No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made. . . ."

The material facts are not disputed. Eugene C. Henning, a Naval Reservist insured under a $10,000 term policy of National Service Life Insurance which named his father as sole beneficiary,[2] died on July 4, 1945, in his country's service. Otto F. Henning, the father, died five months later, without having received any part of the policy's proceeds. Bessie, his second wife and the insured's stepmother, and Clara Belle, his former wife and the insured's natural mother, survived. Both survivors subsequently filed claims to the proceeds of the serviceman's policy. On June 30, 1949, during the pendency of an interpleader action for a judicial determination of the proper taker, Bessie died, leaving the natural mother as sole surviving claimant. The Government thereupon asserted that Bessie had last borne the parental relationship to the insured; that consequently Clara Belle could not come within the statutory class of devolutionary takers; and that, in the absence of cognizable claims to the proceeds, they escheat to the National Service Life Insurance Fund.

The District Court's judgment, however, divided the proceeds, payable in installments, among three parties.[3] The court read the statute as imposing no bar to the

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[2] The insured at one time had designated his wife as beneficiary and his father as contingent beneficiary. Subsequently he properly changed this designation and named his father as sole beneficiary. The marriage was dissolved prior to the insured's death. The earlier designation is thus not material here.

[3] 93 F. Supp. 380 (D. Mass. 1950).

award of matured but unpaid installments to the estates of deceased beneficiaries. It therefore awarded to the father's estate the installments which had matured during his lifetime but remained unpaid. And, finding that Bessie, the stepmother, had stood *in loco parentis* to the insured for at least one year prior to his entry into active service, it concluded that both she and Clara Belle, the natural mother, were parents who "last bore that relationship" and thus qualified to take the remaining proceeds by devolution under § 602 (h)(3)(C) of the Act. The installments which had matured during the stepmother's lifetime were shared equally between her estate and Clara Belle; installments thereafter maturing were awarded to the latter alone.

The Court of Appeals agreed.[4] Conceding that the literal wording of the statute went "a long way" toward sustaining the Government's opposing contentions, the court, fearful of unfortunate consequences that might flow from strict adherence to the text of the Act, nevertheless ruled that estates of deceased beneficiaries might take. And, noting its disagreement with the Second Circuit's ruling in *Baumet* v. *United States*,[5] it further held that one *in loco parentis* who qualified as a beneficiary under § 602 (h)(3)(C) of the Act did not necessarily exclude from participation in policy proceeds a natural parent of the same sex who also "last bore" the parental relationship to the insured.

We granted certiorari to settle problems important in the administration of the National Service Life Insurance

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[4] 191 F. 2d 588 (1st Cir. 1951). The Court of Appeals reversed and remanded for proper computation of the installments which it found due the various parties. In view of our disposition of the case, we are not now concerned with that part of its holding.

[5] 191 F. 2d 194 (1951), cert. granted, 343 U. S. 925, decided this day, *post*, p. 82.

Act and to resolve conflicting statutory interpretations by the Courts of Appeals. 342 U. S. 917.

Congress through war risk insurance legislation has long sought to protect from financial hardship the surviving families of those who had served under the nation's flag. Comprehensive insurance programs enacted in 1917, 1940, and 1951 reflect this consistent legislative concern in times of crisis. Since public funds were to meet a large part of the programs' cost,[6] the statutes closely circumscribed the class of permissible takers to preclude those not the object of congressional concern from draining the treasury when hazards of war service multiplied policy maturities. The War Risk Insurance Act of 1917 enumerated only the serviceman's spouse and immediate blood relatives as permissible beneficiaries of policy proceeds;[7] a beneficiary's interest was extinguished by death.[8] The National Service Life Insurance Act of 1940, again constricting the class of permissible takers,[9] restates the legislative purpose of the prior Act. In the Servicemen's Indemnity Act of 1951 the previous restrictions once more appear, reiterated in a flat proviso: "No payment shall be made to the estate of any deceased person."[10] Accenting these wartime limitations is the liberalizing legislation by which Congress after cessation of hostilities in World Wars I and II placed its insurance programs on more nearly a commercial basis. Amend-

[6] *E. g.*, § 403, W. R. I. A. of 1917, 40 Stat. 410; § 602 *et seq.*, N. S. L. I. Act of 1940, 38 U. S. C. § 802 *et seq.*, see *United States* v. *Zazove*, 334 U. S. 602, 616 (1948); Servicemen's Indemnity Act of 1951, 38 U. S. C. (Supp. V) § 851 *et seq.*; S. Rep. No. 91, 82d Cong., 1st Sess.; H. R. Rep. No. 6, 82d Cong., 1st Sess.

[7] § 402; 40 Stat. 409.

[8] *Cassarello* v. *United States*, 271 F. 486; *Salzer* v. *United States*, 300 F. 764.

[9] § 602 (g); 38 U. S. C. § 802 (g).

[10] § 3; 38 U. S. C. (Supp. V) § 852.

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ments to the War Risk Insurance Act in 1919 expanded the permitted beneficiary class to include more distant relatives of the insured, and, significantly, provided that installments payable but unpaid upon a beneficiary's death might go to his estate.[11] This broadening legislation was substantially reenacted in the World War Veterans' Act of 1924.[12] And after World War II, Congress in 1946 once more liberalized the benefits of the National Service Life Insurance Act. As to policies maturing after August 1946 it removed the restrictions on the insured's choice of beneficiary, and in certain instances permitted the payment of installment proceeds to deceased beneficiaries' estates.[13] From this course of legislation an unmistakable pattern of congressional policy emerges: Statutes enacted in time of war crisis narrow the range of beneficiaries; post-war legislation broadens it.[14]

Section 602 of the N. S. L. I. Act of 1940, governing the distribution of the policy proceeds here in controversy, must take meaning from its historical setting. Cf. *United*

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[11] §§ 4, 13, 19; 41 Stat. 371, 375, 376.

[12] §§ 3, 26; 43 Stat. 607, 614; 38 U. S. C. §§ 424, 451.

[13] §§ 4, 9; 60 Stat. 782, 785; 38 U. S. C. §§ 802 (g), (u).

[14] As to the 1946 amendments, see testimony of Mr. Harold W. Breining, Assistant Administrator for Insurance, Veterans' Administration, Hearings before the Subcommittee on Insurance of the Committee on World War Veterans' Legislation, House of Representatives, 79th Cong., 2d Sess., on H. R. 5772 and H. R. 5773 (p. 1):

"The fundamental reasons for liberalization are that during the war the bulk of losses all came from the National Treasury. Through this method the Government assumed the losses due to the extra hazards of military and naval services. Since the Government during the war bore the major part of the losses it was not felt that the Government would want to pay, indirectly through this channel, large sums of money to persons who might be beneficiaries only because of some speculation, or because the insured might wish to give it to them as distinguished from persons who were likely to be dependent or to whom the insured might owe some semblance of a moral obligation. These restrictions originally were placed in the law with the

States v. *Zazove*, 334 U. S. 602 (1948). Subsection (i) conditions the right of a beneficiary to the payment of any installments "upon his or her being alive to receive such payments"; it adds that "no person shall have a vested right to any installment . . . and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority . . . ." And subsection (j), so as to disclaim any possible analogy to prior peacetime legislation which at one time had been construed to confer such rights,[15] emphasizes that "no installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary." On the contrary, the subsection directs "in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made."

In the face of this clear statutory language we are nevertheless urged to distinguish installments neither accrued nor paid from accrued installments that an intended beneficiary for some reason has not received. Whereas

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clear intent that they would be eliminated when the period of the emergency was over."

For congressional attitudes in enacting the W. R. I. A. of 1917, see, *e. g.*, 55 Cong. Rec. 6761, 7690, and H. R. Rep. No. 130, 65th Cong., 1st Sess., Pt. 3, p. 5. The legislative history of the 1940 Act contains little expression of congressional intent. The Act was presented while a controversial revenue measure was under consideration. The Committee reports accompanying the revenue bill of which the N. S. L. I. Act became part contain no reference to the insurance legislation. A Conference Committee Report devoted less than a page to the Insurance Act. See H. R. Rep. No. 2894, S. Rep. No. 2114, H. R. Rep. No. 3002, all of the 76th Cong., 3d Sess.

[15] *McCullough* v. *Smith*, 293 U. S. 228 (1934); cf. *United States* v. *Citizens Loan & Trust Co.*, 316 U. S. 209 (1942), both cases involving the 1925 amendments to the World War Veterans' Act. 43 Stat. 1310, 38 U. S. C. § 514.

the former concededly may not pass to the estate of a deceased beneficiary, it is argued that the latter may. For to hold otherwise, the argument runs, might result in "amazing consequences"; the government, for example, by simply withholding payments until one beneficiary died might unjustly enrich another in a lower priority, or, if none survived, favor the public purse; moreover, a low-priority beneficiary by litigating a specious claim might profitably suspend payment until the higher-priority takers died.

We reject the conclusion and its premises. The asserted distinction assumes that when Congress in § 602 (i) conditioned payment to beneficiaries on their "being alive to receive such payments" it meant something else; that it exempted, without words or other indication, installments accrued but not yet paid. But to read such language into subsection (i) strips it of significance; if limited in application to unmatured installments the strictures of that subsection would be mere surplusage, forbidding what the priority ladder of § 602 (h)(3) in any event could not logically permit. We cannot so nullify the clear import of subsection (i). In drafting the 1940 statute, Congress must have been fully cognizant of insurance legislation of the prior war. The 1917 War Risk Insurance Act was well understood to prohibit payment of accrued installments to the estates of beneficiaries who did not live to take their intended shares; [16] the very contention made here today was then examined and rejected.[17] No peacetime amendments, as those which in

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[16] Treasury Dept., Bureau of War Risk Insurance, Division of Military and Naval Insurance, Bulletin No. 1, p. 4 (1917); *Cassarello* v. *United States*, 271 F. 486 (1919).

[17] 24 Comp. Dec. 733 (1918). Cf. *American National Bank & Trust Co.* v. *United States*, 77 U. S. App. D. C. 243, 134 F. 2d 674 (1943); *United States* v. *Lee*, 101 F. 2d 472 (1939), which interpreted 38 U. S. C. § 516, providing for reinstatement of lapsed World War I

1919 and 1924 specifically altered the deliberate wartime result, can aid the contention presented today.[18] The conclusion is irresistible that when in 1940 the law conditioned payments on the beneficiary's *being alive to receive* them, Congress said what it meant and meant what it said. Were more needed, the consistent course of administrative practice under the Acts of 1917 and 1940 applied the statutes to bar payments to deceased beneficiaries' estates;[19] that factor, too, must be accorded weight. *United States* v. *Zazove, supra; United States* v. *Citizens Loan & Trust Co.*, 316 U. S. 209 (1942); *United States* v. *Madigan*, 300 U. S. 500 (1937). We are not unmindful of the fact that unanticipated delay in the payment of policy proceeds may withhold from a beneficiary the funds that Congress intended him to get; seven years and three deaths have not yet brought this litigation to an end. But we cannot apportion the blame for this cruel delay. And we may surely not speculate that the officials entrusted with the administration of the Act would attempt to enrich other beneficiaries or the treasury itself by a sardonic waiting game.

We conclude that in this crisis legislation Congress, fully aware of the sometimes inevitable delays in pay-

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policies, as forbidding the payment of installments to the estates of deceased beneficiaries. These holdings turned on the section's enumeration of a restricted class of permissible takers; estates of deceased persons were held not to fall within that class. The pertinent terms of that enactment are almost identical with portions of §§ 602 (g) and (h) of the National Service Life Insurance Act we must construe today.

[18] Since this policy matured in 1945, we are not here concerned with whatever effects the 1946 amendments to the National Service Life Insurance Act might have on this or similar cases.

[19] See 24 Comp. Dec. 733 (1918); Bulletin, note 16, *supra;* Communication to the Solicitor General of the United States from the Solicitor, Veterans' Administration, dated March 12, 1952, reprinted as Appendix B, Brief for the United States.

ment, preferred the occasionally harsh result to a course of action which would permit funds intended for living members of the narrow statutory class of permissible takers to seep down to an enlarged class of sub-beneficiaries created not by the Act itself but by intended beneficiaries' testamentary plans. Courts may not flout so unmistakable a legislative purpose, expressed in so clear a congressional command. *United States* v. *Citizens Loan & Trust Co., supra; Wissner* v. *Wissner,* 338 U. S. 655 (1950). We hold that the award of accrued installments to the estates of deceased beneficiaries cannot stand.

There remains the controversy between the natural mother and the United States. The Government contends that because Bessie, the stepmother, had stood *in loco parentis* to the insured at the time of his death, she was *the* maternal parent "who last bore that relationship" within the meaning of § 602 (h)(3)(C); consequently Clara Belle, the natural mother, despite a District Court finding that she, too, "last bore that relationship," was displaced and forever lost any right to take by devolution under the Act. In essence, the argument is that no more than one parent of each sex may contemporaneously meet the test imposed by the Act; the "last" parent takes all, to the exclusion of others. And since *the* "last" parent is now dead, no one may take.

We cannot agree. While the contention has the merit of simplicity, simplicity cannot supplant statutory interpretation. Section 602 (h)(3)(C), too, has a historical setting. The National Service Life Insurance Act as enacted in 1940 confined the class of devolutionary takers to the spouse and blood relatives of the insured.[20] So written

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[20] §§ 602 (g) and (h)(3)(C), 54 Stat. 1010. The insured, however, was permitted to designate persons *in loco parentis* as beneficiaries.

the legislation proved unsatisfactory in practice. As construed, that provision required payment of proceeds to an insured's natural parents though they had abandoned him to be raised and supported wholly by foster parents, the latter being excluded from participation by the Act.[21] Upon recommendation of the Veterans' Administrator, Congress in 1942 amended the Act to foreclose that result. Persons who stood *in loco parentis* to the insured for at least one year prior to his entry into active military service were included within the Act's definition of "parent." And they qualified as takers by devolution if they "last bore that relationship" to the insured,[22] an essential statutory condition to preclude the parceling out of proceeds among a series of transient hosts and to assure full benefits to those most likely to merit the insured's financial support. The thrust of the amendment thus was directed at the inclusion of worthy foster parents, not the exclusion of natural parents however deserving.

It may well be that ordinarily a foster relationship does not begin until natural parental ties, realistically viewed, are severed; if so, the foster parent bears the parental relationship when the natural parent has ceased to be such in truth and fact. And in that case, the clear intent of the 1942 amendments would demand the exclusion of the natural parent from participation in the proceeds. But since that determination, based on realities, not status, necessarily must depend on the facts of a particular case, it is peculiarly within the competence of others who are closer to the living facts. Here the District Court found that the parental relationship con-

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[21] S. Rep. No. 1430, 77th Cong., 2d Sess., p. 2; H. R. Rep. No. 2312, 77th Cong., 2d Sess., p. 4. Cf. S. Rep. No. 91, 82d Cong., 1st Sess., p. 12; H. R. Rep. No. 6, 82d Cong., 1st Sess., p. 14.

[22] §§ 7 to 9, 56 Stat. 659; 38 U. S. C. §§ 801 (f), (g), and (h) (3) (C). Cf. § 3 of the Servicemen's Indemnity Act of 1951, 38 U. S. C. (Supp. V) § 852.

tinued until the insured's death, and the Court of Appeals observed that "there is no finding or evidence of any estrangement, to say nothing of abandonment, or even any lack of parental feeling, between [the insured] and his mother, Clara Belle." [23] Unable to freeze into formula the subtle family relations that may constitute a genuine parental bond, we must accept what the courts below deemed a continuing parental relationship between mother and son.

Since we hold that Clara Belle Henning, the insured's natural mother, is a surviving beneficiary entitled to take by devolution under § 602 (h)(3)(C), the Government may of course not invoke the provisions of § 602 (j) to withhold, for the benefit of the National Service Life Insurance Fund, payment of the installments accrued from the date of the insured's death. It equally follows that the method of distribution of installments to Clara Belle, as "the beneficiary to whom payment is first made," must depend on her age at the date of policy maturity, subject to her election of an optional settlement as provided by § 602 (h)(1) and (2) and applicable administrative regulations under the Act.[24]

Reversed.

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I agree with the opinion and the judgment of the Court insofar as it holds that no installments may be paid to the legal representatives of the estates of the respective deceased beneficiaries. However, I feel obliged to conclude that, within the meaning of the Act, only the natural father and the foster mother of the insured *last*

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[23] 191 F. 2d, at 593.

[24] 38 U. S. C. § 802 (h)(1) and (2); 38 CFR, 1944 Supp., § 10.3475 *et seq.*, applicable to this policy which matured in 1945.

bore to him, at the time of his death, the relationship of parents. That *last* relationship was then to the exclusion of everyone, even to the exclusion of his natural mother. Consequently, upon the death of those two persons who *last* bore the relationship of parent to the insured, there remained no person entitled under the terms of the Act to receive any of the proceeds as a contingent beneficiary. Accordingly, the proceeds should be withheld for the benefit of the National Service Life Insurance Fund.

MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins, dissenting.

Perhaps a halfhearted dissent, like an extemporaneous speech, is only worth the paper it is written upon. We do no more than point out that we would prefer a more benign construction of these complex statutes which would be equally reasonable.

The problem is of that recurring sort well described by Judge Learned Hand as follows:

> "The issue involves the baffling question which comes up so often in the interpretation of all kinds of writings; how far is it proper to read the words out of their literal meaning in order to realize their overriding purpose? It is idle to add to the acres of paper and streams of ink that have been devoted to the discussion. When we ask what Congress 'intended,' usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion. He who supposes that he can be certain of the result, is the least fitted for the attempt." *United States* v. *Klinger,* 199 F. 2d 645, 648.

The literal language of Congress in 38 U. S. C. § 802 (i) we would read with emphasis as follows: "The *right* of any beneficiary to payment of any installments shall be conditioned upon his or her being *alive to receive such payments.*" This, on our reading, says that a beneficiary's claim to an installment is matured and his right is perfected when the installment becomes due and he is alive to receive it whether or not he then actually reduces it to possession. Under the Court's construction, no "right" to an installment comes into existence until the claimant has actually received payment. On that event, we would think he would cease to have the "right." It is not clear what the Court would do about the case where a check was sent to pay the claim and the claimant died while it was in the mails or after he had received the check but before it was actually presented for payment. But to us this language means that installments accrue to a beneficiary when they fall due during his lifetime and thereupon become his of right.

We do not read § 802 (j) as taking away what § 802 (i) grants. It may be read with this emphasis: "No installments of such insurance shall be paid to the heirs or legal representatives *as such* of the insured or of any beneficiary . . . ." Just what "as such" adds or subtracts may be debated, but to us the phrase, if it is to have any significance in this context, means that payments cannot *accrue* to an administrator or executor, because a personal representative *as such* cannot become a beneficiary. But it does not mean that the personal representative cannot collect installments which had become the "right" of decedent during his lifetime.

This construction would avoid what the Court admits is a harsh and capricious result. It seems strange, in dealing with a bereaved beneficiary, if our Government makes a promise to the ear to be broken to the hope. Under the Court's view, though the beneficiary is alive

to receive the payment and therefore has the statutory "right" to it, any event that delays its actual payment may cancel his "right." By an adverse claim, however fictitious, or a litigation, however frivolous, a junior beneficiary may delay payments and gamble on winning them for himself through death of the senior beneficiary. Some period of waiting is inevitable in the settlement of claims in any event, and we all know the tendency of claim papers to shuffle back and forth between Washington desks while time, which means little to the administrative staff, means everything to the claimant. We would not put upon beneficiaries all risks caused by delay and thus make their statutory rights as contingent as lottery tickets. Beneficiaries of this class are often dependents, left in urgent need by death of the insured. When red tape or litigiousness delays the promised income, should not the beneficiary while waiting to hear from Washington have a firm right to accrued installments on which he or his estate could depend? The reasoning that would deny the asset to the estate may also deny the needy beneficiary credit.

We do not think that the Court's admittedly harsh result is the fairest permissible interpretation of this statute. We would allow the estate of a beneficiary to recover payments that fall due while the beneficiary is alive to receive them. On this point alone do we dissent.

BAUMET ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 39. Argued October 15, 1952.—Decided November 17, 1952.

At the time of the death in 1942 of a serviceman insured under the National Service Life Insurance Act of 1940, his policy designated an uncle as sole beneficiary. The insured's natural father instituted an action to claim the proceeds. The uncle died while that action was pending. The District Court found that the uncle and the uncle's wife had stood *in loco parentis* to the insured from 1938 until the death of the insured; and that, long before the insured's death, his natural father had abandoned him. *Held:*

1. An award to the deceased uncle's personal representative cannot be sustained. *United States* v. *Henning, ante,* p. 66. Pp. 83–84.

2. Since the natural father had abandoned his son and thus ceased to be a parent in truth and fact, he is not a parent "who last bore that relationship" within the meaning of § 602 (h) (3) (C) and therefore may not claim the proceeds. Pp. 84–85.

3. The insured's foster mother (the uncle's wife), as the sole survivor of those who "last bore" the parental relationship to the insured, was entitled in her own right to all the accrued policy proceeds. P. 85.

191 F. 2d 194, reversed.

In an action to determine the beneficiary under a policy of National Service Life Insurance, the District Court made an award of part of the proceeds to the personal representative of a deceased beneficiary. The Court of Appeals affirmed. 191 F. 2d 194. This Court granted certiorari. 343 U. S. 925. *Reversed,* p. 85.

Louis A. D'Agosto argued the cause and filed a brief for petitioners.

Morton Liftin argued the cause for the United States. With him on the brief were *Acting Solicitor General*

Stern, Assistant Attorney General Baldridge and *Paul A. Sweeney.*

Thomas Thacher argued the cause for Peters, individually and as Executrix, respondent. With him on the brief was *George G. Gallantz.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Based on conflicting claims to the proceeds of a National Service Life Insurance policy, this is a companion case to *United States* v. *Henning, ante,* p. 66, decided today.

The controversy is bottomed on the following facts: At the time of the insured serviceman's death in 1942, his policy designated John J. Peters, his uncle, as sole beneficiary. Challenging the uncle's standing as a permissible beneficiary under the statute, William Baumet, the insured's natural father, instituted an action to claim the proceeds.[1] Before that action came to trial, John J. Peters died.[2] After a subsequent trial of the cause, the District Court found that John J. Peters and his wife Julie Peters had stood *in loco parentis* to the insured from 1938 until his death, and that the natural father's

[1] The insured's natural mother died in 1936, and no claim is raised on her behalf. However, the infant half-brothers and half-sisters of the insured by their guardian *ad litem* filed a claim asserting that they followed their father William Baumet on the priority ladder of § 602 (h) (3); 38 U. S. C. § 802 (h) (3). But their standing under § 602 (h) (3) (D) is conditioned on the absence of takers qualifying under § 602 (h) (3) (C). Since we find such a taker, their claims need not be considered here.

[2] Julie Peters, as John's executrix, moved for substitution in his stead. The District Court denied the motion, on the ground that John J. Peters' rights were extinguished by his death. 81 F. Supp. 1012 (S. D. N. Y. 1948). The Court of Appeals reversed, holding that accrued installments passed to a deceased beneficiary's estate. 177 F. 2d 806 (2d Cir. 1949), cert. denied, 339 U. S. 923 (1950). A subsequent trial followed.

contemporaneous conduct had amounted to an abandonment of his son.[3] Concluding that John J. Peters, as a person *in loco parentis,* was a validly designated beneficiary under the Act,[4] it dismissed Baumet's complaint. Accordingly, the court awarded the installments which had matured during John J. Peters' lifetime to Julie Peters as his personal representative, and the installments thereafter maturing to Julie individually as a person *in loco parentis* who "last bore" the parental relationship to the insured.[5] The Court of Appeals affirmed.[6] It agreed that "after 1938 his father never saw him, manifested no interest in his career and contributed nothing toward his support"; in fact, there was "a permanent estrangement between them." [7] And it approved the District Court's allocation of the policy's proceeds. In so holding, the Court of Appeals assumed that estates of deceased beneficiaries were proper takers, and that the foster parents had long supplanted the natural father in the parental relationship to the insured. In any event, the court thought, "the insured can have but one maternal parent and one paternal parent." [8] We granted certiorari, 343 U. S. 925.

For the reasons detailed in *United States* v. *Henning, supra,* we hold that estates of deceased beneficiaries may not take proceeds under the Act. The award to John J. Peters' personal representative must therefore fall. In regard to the natural father's claim, the District Court's findings sharply reveal that William Baumet long before

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[3] The District Court's unreported findings and opinion are reprinted at pp. 10 to 24 of the Appendix to the Brief for the United States.

[4] §§ 601 (f), 602 (g); 38 U. S. C. §§ 801 (f), 802 (g).

[5] § 602 (h) (3) (C); 38 U. S. C. § 802 (h) (3) (C).

[6] *Baumet* v. *United States,* 191 F. 2d 194 (2d Cir. 1951).

[7] *Id.,* at 195–196.

[8] *Ibid.*

his son's death had "abandoned his son" and ceased to be a parent in truth and fact. He may not now retrieve the discarded paternal robes to lay claim to the policy proceeds; to rule otherwise would foil the plain intent of the 1942 amendments. Since the foster parents, not he, "last bore" the parental relationship, he cannot qualify as a taker by devolution under § 602 (h)(3)(C) of the Act. For that reason we hold that the foster mother, Julie Peters, as the sole survivor of those who "last bore" the parental relationship, in her own right must take all accrued policy proceeds.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, for the reasons stated in the dissenting opinion of MR. JUSTICE JACKSON in *United States* v. *Henning, ante,* p. 79, decided this date, dissent from the Court's refusal to permit the deceased beneficiary's estate to share in the proceeds.

MR. JUSTICE DOUGLAS, dissenting in part.

I think William Baumet and Julie Peters should share the accrued policy proceeds *pari passu.* I believe that the natural father as well as the foster mother "last bore" the parental relationship to the insured. No law, no dictionary, no form of words can change that biological fact. The natural father, as well as the natural mother, remains a parent no matter how estranged parent and child may become. A stranger may by conduct become a foster parent; but no conduct can transmute a natural parent into a stranger.

SWEENEY, SHERIFF, *v.* WOODALL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 100. Certiorari granted and judgment reversed, Nov. 17, 1952.

A fugitive from an Alabama prison was arrested in Ohio and held there for return to Alabama pursuant to proceedings instituted by the Governor of Alabama. Although he had made no attempt to raise such a question in the courts of Alabama, he claimed in Ohio that his confinement in Alabama amounted, and would amount again, to cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments; and he applied unsuccessfully to an Ohio state court for release on a writ of habeas corpus. After exhausting his remedies in the Ohio courts, he applied to a federal district court in Ohio for habeas corpus on the same grounds. Alabama was not a party to that proceeding. *Held:* The district court should not entertain the application on its merits. Pp. 87–90.

(a) The scheme of interstate rendition set forth in Art. IV, § 2, cl. 2 of the Constitution and the statutes thereunder contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by that state in the asylum state to defend against claimed abuses of the former state's prison system. Pp. 89–90.

(b) The prisoner should test the constitutionality of his treatment by Alabama in the courts of that State, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned. P. 90.

194 F. 2d 542, reversed.

The District Court dismissed respondent's petition for habeas corpus. The Court of Appeals reversed. 194 F. 2d 542. On petition to this Court, *certiorari granted and judgment reversed,* p. 90.

Frank T. Cullitan and *Gertrude M. Bauer* for petitioner.

Frank C. Lyons for respondent.

Eugene Cook, Attorney General, *M. H. Blackshear, Jr.,* Deputy Assistant Attorney General, and *Lamar W. Sizemore,* Assistant Attorney General, filed a brief for the State of Georgia, as *amicus curiae,* supporting the petition.

PER CURIAM.

The respondent is a fugitive from a prison in Alabama. The Governor of that State instituted proceedings for his return, and respondent was arrested in Ohio. Petitioner, the Sheriff of Cuyahoga County, Ohio, now holds respondent for delivery to the authorities of Alabama.

In an attempt to prevent his rendition to Alabama, respondent applied to the Court of Common Pleas of Cuyahoga County for a writ of habeas corpus. He alleged that during his confinement in Alabama he had been brutally mistreated, that he would be subjected to such mistreatment and worse if returned. Invoking the Eighth and Fourteenth Amendments, he asserted that his past confinement had amounted to cruel and unusual punishment, that any future confinement administered by Alabama would similarly be in violation of rights secured to him under the Federal Constitution. Respondent asked that petitioner's efforts to return him to the custody of Alabama be halted and that he be immediately released.

Refusing to hear this claim on its merits, the Court of Common Pleas denied respondent's application. This judgment was affirmed by the Ohio Court of Appeals for the Eighth District. 88 Ohio App. 202, 89 N. E. 2d 493. An appeal to the State's Supreme Court was dismissed. 152 Ohio St. 368, 89 N. E. 2d 494. This Court denied a petition for certiorari. 339 U. S. 945.

Respondent then applied to the United States District Court for the Northern District of Ohio, seeking his release upon the same ground theretofore urged in the Ohio

courts. The District Court dismissed his petition for a writ of habeas corpus without hearing evidence. But the Court of Appeals for the Sixth Circuit reversed, without opinion, remanding the cause to the District Court for a hearing on the merits of the constitutional claim. 194 F. 2d 542. Petitioner has now applied to this Court for a writ of certiorari.

Recently, in *Dye* v. *Johnson,* 338 U. S. 864 (1949), this Court considered a petition for certiorari in a similar case. The Court of Appeals for the Third Circuit had sustained an application for habeas corpus by a fugitive prisoner from Georgia who alleged, as respondent does now, that his confinement in the demanding state amounted to cruel and unusual punishment in violation of his constitutional rights. Presented with a petition for certiorari to review this decision, we reversed, summarily, citing *Ex parte Hawk,* 321 U. S. 114 (1944). Shortly after our decision in the *Dye* case, the Court of Appeals for the District of Columbia Circuit affirmed a District Court's dismissal of a similar petition for habeas corpus from still another fugitive, holding that the federal courts in the asylum should not entertain such applications. *Johnson* v. *Matthews,* 86 U. S. App. D. C. 376, 182 F. 2d 677 (1950).[1]

In the present case, as in the others, a fugitive from justice has asked the federal court in his asylum to pass

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[1] In other similar cases, the Court of Appeals for the Ninth Circuit, in *Ross* v. *Middlebrooks,* 188 F. 2d 308 (1951), and the Court of Appeals for the Eighth Circuit, in *Davis* v. *O'Connell,* 185 F. 2d 513 (1950), have reached a like result. In *United States ex rel. Jackson* v. *Ruthazer,* 181 F. 2d 588 (1950), the Court of Appeals for the Second Circuit held that a fugitive from Georgia was not entitled to a hearing in the federal courts in his asylum on the ground that the merits had been fully heard in the state courts of the asylum and the fugitive's claim disproved.

upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and although he has made no attempt to raise such a question in the demanding state. The question is whether, under these circumstances, the district court should entertain the fugitive's application on its merits.

Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to attack Alabama's penal process by an action brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer for that State. Indeed, as a prisoner of Alabama, under the provisions of 28 U. S. C. § 2254,[2] and under the doctrine of *Ex parte Hawk, supra,* he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama.

By resort to a form of "self help," respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not affect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the

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[2] "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Constitution [3] and the statutes which Congress has enacted to implement the Constitution,[4] contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system.[5] Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned.

The District Court properly dismissed the application for habeas corpus on its face, and the Court of Appeals erred in holding that the applicant was entitled to a hearing in the District Court of Ohio on the merits of his constitutional claim against prison officials of Alabama.

Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE FRANKFURTER, concurring.

I join in the Court's opinion because I agree that due regard for the relation of the States, one to another, in our federal system and for that of the courts of the

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[3] U. S. Const., Art. IV, § 2, cl. 2:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

[4] 1 Stat. 302, as amended, 18 U. S. C. § 3281.

[5] Cf. *Drew* v. *Thaw*, 235 U. S. 432 (1914).

United States to those of the States requires that claims even as serious as those here urged first be raised in the courts of the demanding State. Even so, it is appropriate to emphasize that in this case there is no suggestion in the application for habeas corpus that the prisoner would be without opportunity to resort to the courts of Alabama for protection of his constitutional rights upon his return to Alabama. We cannot assume unlawful action of the prison officials which would prevent the petitioner from invoking the aid of the local courts nor readily open the door to such a claim. Compare *Cochran* v. *Kansas,* 316 U. S. 255. Our federal system presupposes confidence that a demanding State will not exploit the action of an asylum State by indulging in outlawed conduct to a returned fugitive from justice.

MR. JUSTICE DOUGLAS, dissenting.

The petition presents facts which, if true, make this a shocking case in the annals of our jurisprudence.

Respondent, a Negro, was convicted of burglary in Alabama and sentenced to hard labor at a state penitentiary. After six years he escaped and was apprehended in Ohio. Thereafter Alabama undertook to extradite him so that he could be returned to Alabama and serve the balance of his sentence. He thereupon filed this petition for habeas corpus to be released from the custody of petitioner, the Ohio sheriff who presently detains him.

He offered to prove that the Alabama jailers have a nine-pound strap with five metal prongs that they use to beat prisoners, that they used this strap against him, that the beatings frequently caused him to lose consciousness and resulted in deep wounds and permanent scars.

He offered to prove that he was stripped to his waist and forced to work in the broiling sun all day long without a rest period.

He offered to prove that on entrance to the prison he was forced to serve as a "gal-boy" or female for the homosexuals among the prisoners.

Lurid details are offered in support of these main charges. If any of them is true, respondent has been subjected to cruel and unusual punishment in the past and can be expected on his return to have the same awful treatment visited upon him.

The Court allows him to be returned to Alabama on the theory that he can apply to the Alabama courts for relief from the torture inflicted on him. That answer would suffice in the ordinary case. For a prisoner caught in the mesh of Alabama law normally would need to rely on Alabama law to extricate him. But if the allegations of the petition are true, this Negro must suffer torture and mutilation or risk death itself to get relief in Alabama. It is contended that there is no showing that the doors of the Alabama courts are closed to petitioner or that he would have no opportunity to get relief. It is said that we should not assume that unlawful action of prison officials would prevent petitioner from obtaining relief in the Alabama courts. But we deal here not with an academic problem but with allegations which, if proved, show that petitioner has in the past been beaten by guards to the point of death and will, if returned, be subjected to the same treatment. Perhaps those allegations will prove groundless. But if they are supported in evidence, they make the return of this prisoner a return to cruel torture.

I am confident that enlightened Alabama judges would make short shrift of sadistic prison guards. But I rebel at the thought that any human being, Negro or white, should be forced to run a gamut of blood and terror in order to get his constitutional rights. That is too great a price to pay for the legal principle that before a state prisoner can get federal relief he must exhaust his state

remedies. The enlightened view is indeed the other way. See *Johnson* v. *Dye,* 175 F. 2d 250 (which unhappily the Court reversed, 338 U. S. 864); *Johnson* v. *Matthews,* 86 U. S. App. D. C. 376, 383–386, 182 F. 2d 677, 684–687; *Commonwealth* v. *Superintendent of County Prison,* 152 Pa. Super. 167, 31 A. 2d 576.

Certainly there can be no solid objection to the use of habeas corpus to test the legality of the treatment of a prisoner who has been lawfully convicted. In *Cochran* v. *Kansas,* 316 U. S. 255, 258, habeas corpus was used to challenge the legality of the practice of prison officials in denying a convict the opportunity of presenting appeal papers to a higher court. And see *In re Bonner,* 151 U. S. 242. Such an act of discrimination against a prisoner was a violation of the Equal Protection Clause of the Fourteenth Amendment. The infliction of "cruel and unusual punishments" against the command of the Eighth Amendment is a violation of the Due Process Clause of the Fourteenth Amendment, whether that clause be construed as incorporating the entire Bill of Rights or only some of its guaranties. See *Adamson* v. *California,* 332 U. S. 46. Even under the latter and more restricted view, the punishments inflicted here are so shocking as to violate the standards of decency implicit in our system of jurisprudence. Cf. *Francis* v. *Resweber,* 329 U. S. 459.

The Court of Appeals should be sustained in its action in giving respondent an opportunity to prove his charges. If they are established, respondent should be discharged from custody and saved the ordeal of enduring torture and risking death in order to protect his constitutional rights.*

*The requirements of 28 U. S. C. § 2241 (c) regulating the use of habeas corpus are met since the charges, if proved, would result in a return of respondent to Alabama to a "custody in violation of the Constitution" of the United States.

KEDROFF ET AL. *v.* SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 3. Argued February 1, 1952.—Reargued October 14, 1952.—Decided November 24, 1952.

In a suit brought in a New York state court by a corporation, holder of the legal title, to determine which prelate was entitled to the use and occupancy of a Cathedral of the Russian Orthodox Church in New York City, the Court of Appeals of New York held for plaintiff, on the ground that Article 5–C of the Religious Corporations Law of New York had the purpose and effect of transferring the administrative control of the Russian Orthodox churches in North America from the Supreme Church Authority in Moscow to the authorities selected by a convention of the North American churches. *Held:* As thus construed and applied, the New York statute interferes with the free exercise of religion, contrary to the First Amendment, made applicable to the states by the Fourteenth Amendment. Pp. 95–121.

(a) Legislation which determines, in an hierarchical church, ecclesiastical administration or the appointment of the clergy, or transfers control of churches from one group to another, interferes with the free exercise of religion contrary to the Constitution. Pp. 106–116, 119.

(b) That the purpose of such legislation is to protect American churches from infiltration of atheistic or subversive influences does not require a different result, though legislative power to punish subversive action cannot be doubted and neither his robe nor his pulpit would be a defense to a cleric attempting subversive actions. Pp. 108–110, 117–121.

(c) *American Communications Association* v. *Douds,* 339 U. S. 382; and *Late Corporation of Latter-Day Saints* v. *United States,* 136 U. S. 1, distinguished. Pp. 117–121.

(d) Freedom to select the clergy, where no improper methods of choice are proven, must now be said to have federal constitutional protection against state interference, as a part of the free exercise of religion. Pp. 115–116.

(e) Even in those cases when property rights follow as incidents from decisions of the church custom or law on ecclesiastical issues, the church rule controls and must be accepted by the civil courts. *Watson* v. *Jones*, 13 Wall. 679. Pp. 115–116, 120–121.

302 N. Y. 1, 33, 96 N. E. 2d 56, 74, reversed and remanded.

In an action brought in a state court by appellee, a New York corporation, to determine the right to the use and occupancy of a church in New York City, the trial court gave judgment in favor of the defendants, appellants here. 192 Misc. 327, 77 N. Y. S. 2d 333. The Appellate Division of the State Supreme Court affirmed. 276 App. Div. 309, 94 N. Y. S. 2d 453. The Court of Appeals reversed. 302 N. Y. 1, 33, 96 N. E. 2d 56, 74. On appeal to this Court, *reversed and remanded,* p. 121.

Philip Adler argued the cause and filed the briefs for appellants.

Ralph Montgomery Arkush argued the cause and filed the brief for appellee.

Mr. Justice Reed delivered the opinion of the Court.

The right to the use and occupancy of a church in the city of New York is in dispute.

The right to such use is claimed by appellee, a corporation created in 1925 by an act of the Legislature of New York, Laws of New York 1925, c. 463, for the purpose of acquiring a cathedral for the Russian Orthodox Church in North America as a central place of worship and residence of the ruling archbishop "in accordance with the doctrine, discipline and worship of the Holy Apostolic Catholic Church of Eastern Confession as taught by the holy scriptures, holy tradition, seven oecumenical councils and holy fathers of that church."

The corporate right is sought to be enforced so that the head of the American churches, religiously affiliated with the Russian Orthodox Church, may occupy the

Cathedral. At the present time that head is the Metropolitan of All America and Canada, the Archbishop of New York, Leonty, who like his predecessors was elected to his ecclesiastical office by a sobor of the American churches.[1]

That claimed right of the corporation to use and occupancy for the archbishop chosen by the American churches is opposed by appellants who are in possession. Benjamin Fedchenkoff bases his right on an appointment in 1934 by the Supreme Church Authority of the Russian Orthodox Church, to wit, the Patriarch *locum tenens* of Moscow and all Russia and its Holy Synod, as Archbishop of the Archdiocese of North America and the Aleutian Islands. The other defendant-appellant is a priest of the Russian Orthodox Church, also acknowledging the spiritual and administrative control of the Moscow hierarchy.

Determination of the right to use and occupy Saint Nicholas depends upon whether the appointment of Ben-

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[1] A sobor is a convention of bishops, clergymen and laymen with superior powers, with the assistance of which the church officials rule their dioceses or districts.

There is no problem of title. It is in the appellee corporation. The issue is the right of use. *St. Nicholas Cathedral* v. *Kedroff*, 302 N. Y. 1, 20, 96 N. E. 2d 56, 66–67.

The deed to the Cathedral Corporation required the grantee to hold the property in accordance with the terms of the Act of 1925, set out at the opening of this opinion. As said by the Court of Appeals, 302 N. Y., at 20, 96 N. E. 2d, at 66:

"Plaintiff does not dispute this trust theory, but on the contrary relies upon it. Plaintiff has endeavored to prove that the beneficial use of the property today rightfully belongs to the Russian church in America (Religious Corporations Law, § 105) which was forced to declare its administrative autonomy at the Detroit sobor of 1924 in order to preserve and adhere to those principles and practices fundamental to the Russian Orthodox faith, free from the influence of an atheistic and antireligious foreign civil government."

See also Religious Corporations Law, § 5, 50 McKinney's N. Y. Laws § 5.

jamin by the Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch for the American churches. The Court of Appeals of New York, reversing the lower court, determined that the prelate appointed by the Moscow ecclesiastical authorities was not entitled to the Cathedral and directed the entry of a judgment that appellee corporation be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral. *St. Nicholas Cathedral* v. *Kedroff,* 302 N. Y. 1, 33, 96 N. E. 2d 56, 74. This determination was made on the authority of Article 5–C of the Religious Corporations Law of New York, 302 N. Y., at 24 *et seq.,* 96 N. E. 2d, at 68 *et seq.,* against appellants' contention that this New York statute, as construed, violated the Fourteenth Amendment to the Constitution of the United States.

Because of the constitutional questions thus generally involved, we noted probable jurisdiction, and, after argument and submission of the case last term, ordered reargument and requested counsel to include a discussion of whether the judgment might be sustained on state grounds. 343 U. S. 972. Both parties concluded that it could not, and the unequivocal remittitur of the New York Court of Appeals, 302 N. Y. 689, 98 N. E. 2d 485, specifically stating the constitutionality of the statute as the necessary ground for decision, compels this view and precludes any doubt as to the propriety of our determination of the constitutional issue on the merits. *Grayson* v. *Harris,* 267 U. S. 352; *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95. The case now has been reargued and submitted.

Article 5–C was added to the Religious Corporations Law of New York in 1945 and provided both for the incorporation and administration of Russian Orthodox churches. Clarifying amendments were added in 1948.

The purpose of the article was to bring all the New York churches, formerly subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow or the Patriarch of Moscow, into an administratively autonomous metropolitan district. That district was North American in area, created pursuant to resolutions adopted at a sobor held at Detroit in 1924.[2] This declared autonomy was made effective by a further legislative requirement that all the churches formerly administratively subject to the Moscow synod and patri-

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[2] 50 McKinney's N. Y. Laws § 105:

"The 'Russian Church in America', as that term is used anywhere in this article, refers to that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

"A 'Russian Orthodox church', as that term is used anywhere in this article, is a church, cathedral, chap[t]el, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district hereinabove defined as the Russian Church in America."

archate should for the future be governed by the ecclesiastical body and hierarchy of the American metropolitan district.[3] The foregoing analysis follows the interpretation of this article by the Court of Appeals of New York, an interpretation binding upon us.[4]

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[3] *Id.*, § 107:

"1. Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district, and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

. . . . . .

"3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November twentieth to twenty-third, nineteen hundred thirty-four, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America."

[4] *Hebert* v. *Louisiana*, 272 U. S. 312, 317; *Winters* v. *New York*, 333 U. S. 507, 514.

The court expressed its conclusion in reversing the judgment of the Appellate Division of the Supreme Court, *St. Nicholas Cathedral* v. *Kedroff*, 276 App. Div. 309, 94 N. Y. S. 2d 453, which had affirmed

Article 5–C is challenged as invalid under the constitutional prohibition against interference with the exercise of religion.[5] The appellants' contention, of course, is based on the theory that the principles of the First Amendment are made applicable to the states by the Fourteenth.[6] See Stokes, Church and State in the United States (1950), vol. 1, c. VIII.

The Russian Orthodox Church is an autocephalous member of the Eastern Orthodox Greek Catholic Church. It sprang from the Church of Constantinople in the Tenth Century. The schism of 1054 A. D. split the Universal Church into those of the East and the West. Gradually self-government was assumed by the Russian Church until in the Sixteenth Century its autonomy was recognized and a Patriarch of Moscow appeared. Fortescue, Orthodox Eastern Church, c. V. For the next one hun-

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the Trial Term. 192 Misc. 327, 77 N. Y. S. 2d 333. The Court of Appeals held:

"The only construction which gives meaning to all the language in sections 105 and 107 is that the statute was intended to apply to those Russian Orthodox churches founded and established before 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established after 1924 for the purpose of adhering and being subject to the autonomous metropolitan district. The majority in the Appellate Division further intimated that to read the statute literally would result in an interference in ecclesiastical concerns not within the competency of the Legislature. The latter suggestion is the only one which requires discussion, for, as already indicated, the intent of the Legislature (as distinguished from its competency) is unmistakable." 302 N. Y., at 29, 96 N. E. 2d, at 71.

[5] First Amendment to the Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

[6] *Hamilton* v. *Regents,* 293 U. S. 245, 262; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Everson* v. *Board of Education,* 330 U. S. 1, 14–15; *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, 210–211; *Zorach* v. *Clauson,* 343 U. S. 306, 310.

dred years the development of the church kept pace with the growth of power of the Czars but it increasingly became a part of the civil government—a state church. Throughout that period it also remained an hierarchical church with a Patriarch at its head, governed by the conventions or sobors called by him. However, from the time of Peter the Great until 1917 no sobor was held. No patriarch ruled or was chosen. During that time the church was governed by a Holy Synod, a group of ecclesiastics with a Chief Procurator representative of the government as a member.

Late in the Eighteenth Century the Russian Church entered the missionary field in the Aleutian Islands and Alaska. From there churches spread slowly down the Pacific Coast and later, with the Slavic immigration, to our eastern cities, particularly to Detroit, Cleveland, Chicago, Pittsburgh and New York. The character of the administrative unit changed with the years as is indicated by the changes in its name. See note 2. In 1904 when a diocese of North America was created its first archbishop, Tikhon, shortly thereafter established himself in his seat at Saint Nicholas Cathedral. His appointment came from the Holy Synod of Russia as did those of his successors in order Platon and Evdokim. Under those appointments the successive archbishops occupied the Cathedral and residence of Saint Nicholas under the administrative authority of the Holy Synod.

In 1917 Archbishop Evdokim returned to Russia permanently. Early that year an All Russian Sobor was held, the first since Peter the Great. It occurred during the interlude of political freedom following the fall of the Czar. A patriarch was elected and installed—Tikhon who had been the first American Archbishop. Uncertainties as to the succession to and administration of the American archbishopric made their appearance following this sobor and were largely induced

by the almost contemporaneous political disturbances which culminated swiftly in the Bolshevik Revolution of 1917. The Russian Orthodox Church was drawn into this maelstrom. After a few years the Patriarch was imprisoned. There were suggestions of his counter-revolutionary activity. Church power was transferred, partly through a sobor considered by many as non-canonical, to a Supreme Church Council. The declared reforms were said to have resulted in a "Living Church" or sometimes in a "Renovated Church." Circumstances and pressures changed. Patriarch Tikhon was released from prison and died in 1925. He named three bishops as *locum tenens* for the patriarchal throne. It was one of these, Sergius, who in 1933 appointed the appellant Benjamin as Archbishop. The Church was registered as a religious organization under Soviet law in 1927. Thereafter the Russian Church and the Russian State approached if not a reconciliation at least an adjustment which eventuated by 1943 in the election of Sergius, one of the bishops named as *locum tenens* by Tikhon, to the Patriarchate. The Living or Renovated Church, whether deemed a reformed, a schismatic or a new church, apparently withered away. After Sergius' death a new Patriarch of the Russian Orthodox Church, Alexi, was chosen Patriarch in 1945 at Moscow at a sobor recognized by all parties to this litigation as a true sobor held in accordance with the church canons.[7]

The Russian upheaval caused repercussions in the North American Diocese. That Diocese at the time of the Soviet Revolution recognized the spiritual and ad-

[7] Fortescue, *supra* (1916); Brian-Chaninov, The Russian Church (1931), c. VIII; Zernov, The Russians and Their Church (1945); French, The Eastern Orthodox Church (1951), c. VII; Danzas, The Russian Church (1936); Anderson, People, Church and State in Modern Russia (1944), pp. 121–140; Bolshakoff, The Foreign Missions of the Russian Orthodox Church (1943), c. IV.

ministrative control of Moscow. White Russians, both lay and clerical, found asylum in America from the revolutionary conflicts, strengthening the feeling of abhorrence of the secular attitude of the new Russian Government. The church members already here, immigrants and native-born, while habituated to look to Moscow for religious direction, were accustomed to our theory of separation between church and state. The Russian turmoil, the restraints on religious activities and the evolution of a new ecclesiastical hierarchy in the form of the "Living Church," deemed noncanonical or schismatic by most churchmen, made very difficult Russian administration of the American diocese. Furthermore, Patriarch Tikhon, on November 20, 1920, issued Decision No. 362 relating to church administration for troublesome times. This granted a large measure of autonomy, when the Russian ruling authority was unable to function, subject to "confirmation later to the Central Church Authority when it is re-established." Naturally the growing number of American-born members of the Russian Church did not cling to a hierarchy identified with their country of remote origin with the same national feeling that moved their immigrant ancestors. These facts and forces generated in America a separatist movement.

That movement brought about the arrangements at the Detroit Sobor of 1924 for a temporary American administration of the church on account of the disturbances in Russia.[8] This was followed by the declarations of autonomy of the successive sobors since that date, a spate of

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[8] The attitude of the Russian Church in America will be made sufficiently plain by these extracts from their records of action taken at the Detroit Sobor, 1924:

"Point 1. Temporarily, until the convocation of the All Russian Sobor further indicated in Point 5, to declare the Russian Orthodox Diocese in America a self-governed Church so that it be governed by its own elected Archbishop by means of a Sobor of Bishops, a Council

litigation concerning control of the various churches and occupancy of ecclesiastical positions,[9] the New York legislation (known as Article 5–C, notes 2 and 3, *supra*), and this controversy.

Delegates from the North American Diocese intended to be represented at an admittedly canonical Sobor of the Russian Orthodox Church held in 1945 at Moscow. They did not arrive in time on account of delays, responsibility for which has not been fixed. The following stipulation appears as to their later actions while at Moscow:

> "It is stipulated that Bishop Alexi and Father Dzvonchik, representing the local group of American Churches under Bishop Theophilus, appeared before the Patriarch and the members of his Synod in Moscow, presented a written report on the condition of the American Church, with a request for autonomy and a few days later received from the Patriarch the Ukase . . . ."

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composed of those elected from the clergy and laity, and periodic Sobors of the entire American Church.

. . . . .

"Point 5. To leave the final regulation of questions arising from the relationship of the Russian and the American Churches to a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church."

[9] *Nemolovsky* v. *Rykhloff*, 187 App. Div. 290, 175 N. Y. S. 617; *Kedrovsky* v. *Archbishop and Consistory*, 195 App. Div. 127, 186 N. Y. S. 346; *Kedrovsky* v. *Rojdesvensky*, 214 App. Div. 483, 212 N. Y. S. 273; *id.*, 242 N. Y. 547, 152 N. E. 421; *Kedrovsky* v. *Archbishop and Consistory*, 218 App. Div. 121, 124, 217 N. Y. S. 873, 875; *id.*, 220 App. Div. 750, 222 N. Y. S. 831; *id.*, 249 N. Y. 75, 516, 162 N. E. 588, 164 N. E. 566; *Nikulnikoff* v. *Archbishop and Consistory*, 142 Misc. 894, 255 N. Y. S. 653; *Waipa* v. *Kushwara*, 259 App. Div. 843, 20 N. Y. S. 2d 174; *id.*, 283 N. Y. 780, 28 N. E. 2d 417.

There came to the Russian Church in America this Ukase of the Moscow Patriarchy of February 14 or 16, 1945, covering Moscow's requirements for reunion of the American Orthodox Church with the Russian. It required for reunion that the Russian Church in America hold promptly an "all American Orthodox Church Sobor"; that it express the decision of the dioceses to reunite with the Russian Mother Church, declare the agreement of the American Orthodox Church to abstain "from political activities against the U. S. S. R." and so direct its parishes, and elect a Metropolitan subject to confirmation by the Moscow Patriarchy. The decree said, "In view of the distance of the American Metropolitan District from the Russian Mother Church . . . the Metropolitan-Exarch . . . may be given some extended powers by the Moscow Patriarchy . . . ."

The American congregations speaking through their Cleveland Sobor of 1946 refused the proffered arrangement and resolved in part:

> "That any administrative recognition of the Synod of the Russian Orthodox Church Abroad is hereby terminated, retaining, however, our spiritual and brotherly relations with all parts of the Russian Orthodox Church abroad . . . ."

This ended the efforts to compose the differences between the Mother Church and its American offspring, and this litigation followed. We understand the above factual summary corresponds substantially with the factual basis for determination formulated by the Court of Appeals of New York. From those circumstances it seems clear that the Russian Orthodox Church was, until the Russian Revolution, an hierarchical church with unquestioned paramount jurisdiction in the governing body in Russia over the American Metropolitanate. Nothing indicates that either the Sacred Synod or the succeeding Patriarchs

relinquished that authority or recognized the autonomy of the American church. The Court of Appeals decision proceeds, we understand, upon the same assumption. 302 N. Y., at 5, 23, 24, 96 N. E. 2d, at 57, 68, 69. That court did consider "whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body." It concluded that this aspect of the controversy had not been sufficiently developed to justify a judgment upon that ground. 302 N. Y., at 22–24, 96 N. E. 2d, at 67–69.

The Religious Corporations Law.—The New York Court of Appeals depended for its judgment, refusing recognition to Archbishop Benjamin, the appointee of the Moscow Hierarchy of the Russian Orthodox Church, upon Article 5–C of the Religious Corporations Law, quoted and analyzed at notes 2 and 3, *supra.*[10] Certainly a legislature

[10] The Court said, 302 N. Y. 1, 96 N. E. 2d 56:

"The Legislature has made a determination that the 'Russian Church in America' was the one which, to use our words in 249 New York at pages 77–78, was the trustee which 'may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)' by reason of the changed situation of the patriarchate in Russia." 302 N. Y., at 30, 96 N. E. 2d, at 72.

"The courts have always recognized that it is the province of the Legislature to make the underlying findings of fact which give meaning and substance to its ultimate directives. The courts have traditionally refused to consider the wisdom or technical validity of such findings of fact, if there be some reasonable basis upon which they may rest." 302 N. Y., at 31, 96 N. E. 2d, at 72–73.

"The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and

is free to act upon such information as it may have as to the necessity for legislation. But an enactment by a legislature cannot validate action which the Constitution prohibits, and we think that the statute here in question passes the constitutional limits. We conclude that Article 5–C undertook by its terms to transfer the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the governing authorities of the Russian Church in America, a church organization limited to the diocese of North America and the Aleutian Islands. This transfer takes place by virtue of the statute. Such a law violates the Fourteenth Amendment. It prohibits in this country the free exercise of religion. Legislation that regulates church administration, the operation of the churches, the appointment of clergy, by requiring conformity to church statutes "adopted at a general conven-

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the Soviet attitude toward things religious. The Legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the patriarchate in the Soviet system. The Legislature realized that the North American church, in order to be free of Soviet interference in its affairs, had declared its temporary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate. On the basis of these facts, and the facts stated (*supra*) and no doubt other facts we know not of, our Legislature concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy. Whether we, as judges, would have reached the same conclusion is immaterial. It is sufficient that the Legislature reached it, after full consideration of all the facts." 302 N. Y., at 32–33, 96 N. E. 2d, at 73–74.

tion (sobor) held in the City of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto," note 3, *supra,* prohibits the free exercise of religion. Although this statute requires the New York churches to "in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)," their conformity is by legislative fiat and subject to legislative will. Should the state assert power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine, the invalidity would be unmistakable.

Although § 5 of the Religious Corporations Law [11] had long controlled religious corporations, the Court of Appeals held that its rule was not based on any constitutional requirement or prohibition.[12] Since certain events of which the Court took judicial notice indicated to it that the Russian Government exercised control over the cen-

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[11] "The trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, ..."

[12] 302 N. Y., at 30, 96 N. E. 2d, at 72:

"As a broad guide this rule undoubtedly has worked well, but it is by no means a constitutional doctrine not subject to change or modification by the same Legislature which announced it, in cases where literal enforcement would be unreasonable and opposed to the public interest. The Legislature, in the exercise of its extensive and acknowledged power to act for the common welfare, may find as a fact that a situation has arisen of such novelty and uniqueness that existing law is incapable of performing its avowed function—the preservation of religious temporalities for the use of their original and accustomed beneficiaries. If the Legislature find as a fact that, because of drastically changed circumstances, the accustomed beneficiaries of religious

tral church authorities and that the American church acted to protect its pulpits and faith from such influences, the Court of Appeals felt that the Legislature's reasonable belief in such conditions justified the State in enacting a law to free the American group from infiltration of such atheistic or subversive influences.[13]

This legislation, Art. 5–C, in the view of the Court of Appeals, gave the use of the churches to the Russian Church in America on the theory that this church would most faithfully carry out the purposes of the religious trust.[14] Thus dangers of political use of church pulpits would be minimized. Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense. But in this case no problem

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properties are thus threatened with their loss, and if there be a basis for such finding, we perceive no constitutional objection to a legislative attempt to trace and identify, as of today, the authentic group entitled to the administration of such properties."

[13] 302 N. Y., at 13, 96 N. E. 2d, at 62:

"The control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later and on the surface, at least, the case appeared to be a proper one for the application of the rule that in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church*, 222 N. Y. 305, 315; *Watson* v. *Jones*, 13 Wall. [U. S.] 679, 724–727; Religious Corporations Law, §§ 4, 5)."

". . . we feel we must accept the historical statements contained in the dissenting opinion of Mr. Justice VAN VOORHIS, below: '. . . In recent public pronouncements the State Department, and our representatives in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. . . .'" 302 N. Y., at 23, 96 N. E. 2d, at 68.

[14] See note 10, *supra*.

of punishment for the violation of law arises. There is no charge of subversive or hostile action by any ecclesiastic. Here there is a transfer by statute of control over churches. This violates our rule of separation between church and state. That conclusion results from the purpose, meaning and effect of the New York legislation stated above, considered in the light of the history and decisions considered below.

Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head. In *Watson* v. *Jones,* 13 Wall. 679, they are spoken of in like terms.[15] That opinion has been given consideration in subsequent church litigation—state and national.[16] The opinion itself, however, did not turn on either the establishment or the prohibition of the free exercise of religion. It was a church controversy in the Third or Walnut Street Presbyterian Church of Louisville, Kentucky, arising out of the slavery conflict and was filled with the acrimony of that period. It was decided here at the 1871 Term. "The government of the [Presbyterian] church is exercised by and through an ascending series of 'judicatories,' known as Church Sessions, Presby-

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[15] "The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization." 13 Wall. 679, 722–723.

[16] Zollmann, American Church Law (1933), c. 9. *E. g., Shepard* v. *Barkley,* 247 U. S. 1; *Barkley* v. *Hayes,* 208 F. 319, 326; *McGinnis* v. *Watson,* 41 Pa. 9; *Missouri ex rel. Watson* v. *Farris,* 45 Mo. 183, 197–198; *First English Lutheran Church* v. *Evangelical Lutheran Synod,* 135 F. 2d 701. Cf. *Gibson* v. *Armstrong,* 7 Ben. Monroe (Ky.) 481; *German Reformed Church* v. *Commonwealth ex rel. Seibert,* 3 Pa. 282.

teries, Synods, and a General Assembly." *Id.*, at 681. The opinion of this Court assumed without question that the Louisville church, its property and its officers were originally and up to the beginning of the disagreements subjected to the operation of the laws of the General Assembly of the Presbyterian Church. *Id.*, at 683. The actual possession of the church property was in trustees; its operation or use controlled by the Session composed of elders.[17] Both were groups elected at intervals by the members.

In May of 1865 the General Assembly, the highest judicatory of the church, made a declaration of loyalty to the Federal Government, denouncing slavery, and directed that new members with contrary views should not be received. The Louisville Presbytery, the immediate superior of the Walnut Street Church, promptly issued a Declaration and Testimony, refusing obedience and calling for resistance to the alleged usurpation of authority. The Louisville Presbytery divided as did the Walnut Street Church and the proslavery group obtained admission into the Presbyterian Church of the Confederate States. In June 1867 the Presbyterian General Assembly

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[17] "One or two propositions which seem to admit of no controversy are proper to be noticed in this connection. 1. Both by the act of the Kentucky legislature creating the trustees of the church a body corporate, and by the acknowledged rules of the Presbyterian Church, the trustees were the mere nominal title-holders and custodians of the church property, and other trustees were, or could be elected by the congregation, to supply their places once in every two years. 2. That in the use of the property for all religious services or ecclesiastical purposes, the trustees were under the control of the church session. 3. That by the constitution of all Presbyterian churches, the session, which is the governing body in each, is composed of the ruling elders and pastor, and in all business of the session the majority of its members govern, the number of elders for each congregation being variable." *Id.*, at 720.

for the United States declared the Presbytery and Synod recognized by the proslavery party were "in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America." They were "permanently excluded from connection with or representation in the Assembly. By the same resolution the Synod and Presbytery adhered to by those whom [the proslavery party] opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky." *Id.*, at 692.

Litigation started in 1866 with a suit in the state court by certain of the antislavery group to have declared their right to act as duly elected additional elders "in the management of the church property for purposes of religious worship." *Id.*, at 685. As the Court of Appeals of Kentucky thought that certain acts of the Louisville Presbytery and the General Assembly of the United States, in pronouncing the additional elders duly elected, were void as beyond their functions, *id.*, at 693,[18] it refused the plea of the antislavery group and left the proslavery elders and trustees in control of the Walnut Street Church.

Thereupon a new suit, *Watson* v. *Jones,* was begun by alleged members of the church to secure the use of the Walnut Street Church for the antislavery group. This suit was to decide not the validity of an election of elders

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[18] *Watson* v. *Avery,* 2 Bush (Ky.) 332, 347 *et seq.*

"But we hold that the assembly, like other courts, is limited in its authority by the law under which it acts; and when rights of property, which are secured to congregations and individuals by the organic law of the church, are violated by unconstitutional acts of the higher [church] courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from the violation of a contract, or the fundamental law of a voluntary association." *Id.*, at 349.

fought out in *Watson* v. *Avery, supra,* but which one of two bodies should be recognized as entitled to the use of the Walnut Street Presbyterian Church. It was determined that plaintiffs had a beneficial interest in the church property and therefore a standing to sue for its proper use, if they were members. *Id.,* at 697, 714. A schism was recognized. *Id.,* at 717. It was held:

> "The trustees obviously hold possession for the use of the persons who by the constitution, usages, and laws of the Presbyterian body, are entitled to that use." *Id.,* at 720.

They were required to recognize "the true uses of the trust." *Id.,* at 722. Then turning to the consideration of an hierarchical church, as defined in n. 15, *supra,* and, as it found the Presbyterian Church to be, this Court said:

> "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.,* at 727.

As the General Assembly of the Church had recognized the antislavery group "as the regular and lawful Walnut Street Church and officers," *id.,* at 694, newly elected, and the trial court had found complainants members of that group, and had entered a decree adjudging that this group's duly chosen and elected pastor, ruling elders

and trustees "respectively entitled to exercise whatever authority in the said church, or over its members or property, rightfully belonged to pastor, elders, and trustees, respectively, in churches in connection with 'The Presbyterian Church in the United States of America,' Old School, and according to the regulations and usages of that church," *id.*, at 698, this Court affirmed the decree.

In affirming, the Court recognized the contrariety of views between jurists as to civil jurisdiction over church adjudications having an effect upon property or its uses, when the civil courts determine the church judicatory has violated the church's organic law.[19] Its ruling is summed up in these words:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular

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[19] Compare *Watson* v. *Avery*, n. 18, *supra*, at 349, with *Watson* v. *Jones*, *supra*, at 732 *et seq.*

> courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." *Id.*, at 728–729.

This is applicable to "questions of discipline, or of faith, or ecclesiastical rule, custom, or law," *id.*, at 727.[20] This controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America. No one disputes that such power did lie in that Authority prior to the Russian Revolution.

Watson v. *Jones*, although it contains a reference to the relations of church and state under our system of laws,[21] was decided without depending upon prohibition of state interference with the free exercise of religion. It was decided in 1871, before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action. It long antedated the 1938 decisions of *Erie R.*

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[20] The decision has encountered vivid and strong criticism for the breadth of its statement that where "a subject-matter of dispute, strictly and purely ecclesiastical in its character," is decided, the civil court may not examine the conclusion to see whether the decision exceeds the powers of the judicatory. *Id.*, at 733. See Zollmann, American Church Law (1933), c. 9, p. 291. The criticism does not go so far, however, as to condemn the nonreviewability of questions of faith, religious doctrine and ecclesiastical government, *Watson* v. *Jones*, at 729, 732, when within the "express or implied stipulations" of the agreement of membership. Zollmann, *supra*, §§ 310, 311, 315, 340.

[21] *Id.*, at 727. See pp. 113, 114–115, *supra*.

Co. v. *Tompkins* and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 64 and 202, and, therefore, even though federal jurisdiction in the case depended solely on diversity, the holding was based on general law rather than Kentucky law.[22] The opinion radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven,[23] we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.

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[22] *Barkley* v. *Hayes*, 208 F. 319, 334; *Sherard* v. *Walton*, 206 F. 562, 564; *Helm* v. *Zarecor*, 213 F. 648, 657.

[23] *Gonzalez* v. *Archbishop*, 280 U. S. 1, 16–17:

"Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations."

See *Brundage* v. *Deardorf*, 55 F. 839, where Taft, Circuit Judge, in overruling a demurrer, stated: "Even if the supreme judicatory has the right to construe the limitations of its own power, and the civil courts may not interfere with such a construction, and must take it as conclusive, we do not understand the supreme court, in Watson v. Jones, to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts." P. 847.

Later the case was considered on appeal by the Circuit Court of Appeals; Lurton, Circuit Judge, writing, thought that the facts proven showed conclusively that *Watson* v. *Jones* did control. 92 F. 214, 230.

Legislative Power.—The Court of Appeals of New York recognized, generally, the soundness of the philosophy of ecclesiastical control of church administration and polity but concluded that the exercise of that control was not free from legislative interference.[24] That Court presented forcefully the argument supporting legislative power to act on its own knowledge of "the Soviet attitude toward things religious." 302 N. Y., at 32–33, 96 N. E. 2d, at 74. It was said:

> "The Legislature realized that the North American church, in order to be free of Soviet interference in its affairs, had declared its temporary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate." 302 N. Y., at 33, 96 N. E. 2d, at 74.

It was thought that *American Communications Assn.* v. *Douds,* 339 U. S. 382, supported the thesis that where there is some specific evil, found as a fact, "some infringement upon traditional liberties was justifiable" to effect a cure. 302 N. Y., at 31, 96 N. E. 2d, at 73. On that reasoning it was thought permissible, in view "of the changed situation of the patriarchate in Russia," to replace it with the Russian Church in America as the ruling authority over the administration of the church. The legal basis for this legislative substitution was found in the theory that the Russian Church in America "was the trustee which 'may be relied upon to carry out more

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[24] *St. Nicholas Cathedral* v. *Kedroff,* 302 N. Y. 1, 30, 96 N. E. 2d 56, 72; note 12, *supra.*

effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier,* 226 N. Y. 114).'" 302 N. Y., at 30, 96 N. E. 2d, at 72. Mindful of the authority of the Court of Appeals in its interpretation of the powers of its own legislature and with respect for its standing and ability, we do not agree with its statement as to legislative power over religious organizations.

In our view the *Douds* case may not be interpreted to validate New York's Article 5–C. That case involved the validity of § 9 (h) of the National Labor Relations Act as amended, 61 Stat. 136, 146, 29 U. S. C. § 159 (h). That section forbade the N. L. R. B. from acting at the suggestion of a labor organization unless affidavits of its officers were filed denying affiliation with subversive organizations or belief in the overthrow of this Government by force or other unconstitutional means. We upheld the enactment as a proper exercise of the power to protect commerce from the evil of disruption from strikes so politically inspired. In so doing we said, "legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights." 339 U. S., at 399. And added, "But insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress." *Id.,* at 400. It is an exaggeration to say that those sound statements point to a legislative power to take away from a church's governing body and its duly ordained representative the possession and use of a building held in trust for the purposes for which it is being employed because of an apprehension, even though reason-

able, that it may be employed for improper purposes. In *Douds* we saw nothing that was aimed at the free expression of views. Unions could have officers with such affiliations and political purposes as they might choose but the Government was not compelled to allow those officers an opportunity to disrupt commerce for their own political ends. We looked upon the affidavit requirement as an assurance that disruptive forces would not utilize a government agency to accomplish their purposes. *Id.*, at 403.

In upholding the validity of Article 5–C, the New York Court of Appeals apparently assumes Article 5–C does nothing more than permit the trustees of the Cathedral to use it for services consistent with the desires of the members of the Russian Church in America. Its reach goes far beyond that point. By fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment. Such prohibition differs from the restriction of a right to deal with Government allowed in *Douds,* in that the Union in the *Douds* case had no such constitutionally protected right. New York's Article 5–C directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy.

We do not think that New York's legislative application of a *cy-pres* doctrine to this trust avoids the constitutional rule against prohibition of the free exercise of religion. *Late Corporation of Latter-Day Saints* v. *United States,* 136 U. S. 1, relied upon by the appellee, does not support its argument. There the Church of Jesus Christ of Latter-Day Saints had been incorporated as a religious corporation by the State of Deseret, with subsequent confirmation by the Territory of Utah. Its property was held

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for religious and charitable purposes. That charter was revoked by Congress and some of the property of the church was escheated to the United States for the use of the common schools of Utah. This Court upheld the revocation of the charter, relying on the reserved power of the Congress over the acts of territories, 136 U. S., at 45–46. The seizure of the property was bottomed on the general rule that where a charitable corporation is dissolved for unlawful practices, *id.*, at 49–50, the sovereign takes and distributes the property according to the *cy-pres* doctrine to objects of charity and usefulness, *e. g.*, schools. *Id.*, at 47, 50–51. A failure of the charitable purpose could have the same effect. *Id.*, at 59. None of these elements exist to support the validity of the New York statute putting the Russian Orthodox churches of New York under the administration of the Russian Church in America. See notes 2 and 3, *supra*.

The record before us shows no schism over faith or doctrine between the Russian Church in America and the Russian Orthodox Church. It shows administrative control of the North American Diocese by the Supreme Church Authority of the Russian Orthodox Church, including the appointment of the ruling hierarch in North America from the foundation of the diocese until the Russian Revolution. We find nothing that indicates a relinquishment of this power by the Russian Orthodox Church.

Ours is a government which by the "law of its being" allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property.[25] Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical

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[25] *Ponce* v. *Roman Catholic Church*, 210 U. S. 296, 322.

issues, the church rule controls.[26] This under our Constitution necessarily follows in order that there may be free exercise of religion.

The decree of the Court of Appeals of New York must be reversed, and the case remanded to that court for such further action as it deems proper and not in contravention of this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER, concurring.*

Let me put to one side the question whether in our day a legislature could, consistently with due process, displace the judicial process and decide a particular controversy affecting property so as to decree that A not B owns it or is entitled to its possession. Obviously a legislature would not have that power merely because the property belongs to a church.

In any event, this proceeding rests on a claim which cannot be determined without intervention by the State in a religious conflict. St. Nicholas Cathedral is not just a piece of real estate. It is no more that than is St. Patrick's Cathedral or the Cathedral of St. John the Divine. A cathedral is the seat and center of ecclesiastical authority. St. Nicholas Cathedral is an archiepiscopal see of one of the great religious organizations. What is at stake here is the power to exercise religious authority. That is the essence of this controversy. It is that even though the religious authority becomes manifest and is exerted through authority over the Cathedral as the outward symbol of a religious faith.

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[26] *Watson* v. *Jones, supra; Barkley* v. *Hayes,* 208 F. 319, 327, affirmed on appeal, *Duvall* v. *Synod,* 222 F. 669; *Shepard* v. *Barkley,* 247 U. S. 1.

*[Joined by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, see *post,* p. 126.]

The judiciary has heeded, naturally enough, the menace to a society like ours of attempting to settle such religious struggles by state action. And so, when courts are called upon to adjudicate disputes which, though generated by conflicts of faith, may fairly be isolated as controversies over property and therefore within judicial competence, the authority of courts is in strict subordination to the ecclesiastical law of a particular church prior to a schism. *Watson* v. *Jones,* 13 Wall. 679. This very limited right of resort to courts for determination of claims, civil in their nature, between rival parties among the communicants of a religious faith is merely one aspect of the duty of courts to enforce the rights of members in an association, temporal or religious, according to the laws of that association. See *Gonzalez* v. *Archbishop,* 280 U. S. 1, 16–17.

Legislatures have no such obligation to adjudicate and no such power. Assuredly they have none to settle conflicts of religious authority and none to define religious obedience. These aspects of spiritual differences constitute the heart of this controversy. The New York legislature decreed that one party to the dispute and not the other should control the common center of devotion. In doing so the legislature effectively authorized one party to give religious direction not only to its adherents but also to its opponents. See *St. Nicholas Cathedral* v. *Kedroff,* 302 N. Y. 1, 24–29, 96 N. E. 2d 56, 68–72.

The arguments by which New York seeks to justify this inroad into the realm of faith are echoes of past attempts at secular intervention in religious conflicts. It is said that an impressive majority both of the laity and of the priesthood of the old local church now adhere to the party whose candidate New York enthroned, as it were, as Archbishop. Be that as it may, it is not a function of civil government under our constitutional system to assure rule to any religious body by a counting of heads.

Our Constitution does assure that anyone is free to worship according to his conscience. A legislature is not free to vest in a schismatic head the means of acting under the authority of his old church, by affording him the religious power which the use and occupancy of St. Nicholas Cathedral make possible.

Again, it is argued that New York may protect itself from dangers attributed to submission by the mother church in Moscow to political authority. To reject this claim one does not have to indulge in the tendency of lawyers to carry arguments to the extreme of empty formal logic. Scattered throughout the country there are religious bodies with ties to various countries of a world in tension—tension due in part to shifting political affiliation and orientation. The consideration which permeates the court's opinion below would give each State the right to assess the circumstances in the foreign political entanglements of its religious bodies that make for danger to the State, and the power, resting on plausible legislative findings, to divest such bodies of spiritual authority and of the temporal property which symbolizes it.

Memory is short but it cannot be forgotten that in the State of New York there was strong feeling against the Tsarist regime at a time when the Russian Church was governed by a Procurator of the Tsar. And when Mussolini exacted the Lateran Agreement, argument was not wanting by those friendly to her claims that the Church of Rome was subjecting herself to political authority.[1] The fear, perhaps not wholly groundless, that the loyalty of its citizens might be diluted by their adherence to a

[1] The Encyclopedia Britannica recounts that under the agreement between the Papal See and Mussolini, "The supremacy of the state was recognized by compelling bishops and archbishops to swear loyalty to the government." Encyclopedia Britannica: "Anticlericalism," 62, 62A (1948 ed.).

church entangled in antagonistic political interests, reappears in history as the ground for interference by civil government with religious attachments.[2] Such fear readily leads to persecution of religious beliefs deemed dangerous to ruling political authority. It was on this basis, after all, that Bismarck sought to detach German Catholics from Rome by a series of laws not too different in purport from that before us today.[3] The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil gov-

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[2] Such apprehension, at least in part, seems to have underlain two important religious controversies in a nation as devoted to freedom as Great Britain and as recently as a century ago. Both the dispute giving rise to the Free Church of Scotland Appeals and the brief but vigorous anti-Catholic outburst of 1850 are not unfairly attributable to a claim by the State of comprehensive loyalty, undeflected by the competing claims of religious faith. See Laski, Studies in the Problem of Sovereignty, 27–68, 121–210. See also Buchanan, The Ten Years' Conflict (Edinburgh, 1849); *Free Church of Scotland* v. *Overtoun*, [1904] A. C. 515; The Free Church of Scotland Appeals (Orr. ed., Edinburgh, 1904).

[3] Reichs-Gesetzblatt, 1871, p. 442; Reichs-Gesetzblatt, 1872, p. 253; Reichs-Gesetzblatt, 1874, p. 43; Reichs-Gesetzblatt, 1876, p. 28; 5 Gesetz-Sammlung für die Königlich Preussischen Staaten 154, 221, 223, 225, 228, 337, 342; 6 *id.*, at 30, 38, 40, 75, 170; 7 *id.*, at 291. These laws have been thus summarized: "The Falk Laws are an attempt to insist on the universal paramountcy of German influences. The expulsion of the Jesuits removed an order which he [Bismarck] believed to be concerned with the promotion of Polish interests. The refusal of bishoprics to any save a German who has followed a course of study approved by the government has a clear purport . . . of purging the Catholic episcopate of men not likely to be in sympathy with German ideals . . . . The twenty-fourth article went even further and gave the State the right of interference with ecclesiastical functions where it deemed them improperly performed. . . . The law of the twentieth of May, 1874, virtually handed over the control of vacant bishoprics to the State . . . . Catholic Churches on Prussian soil were handed over to the old Catho-

ernment to exert pressure upon religious authority. Religious leaders have often made gestures of accommodation to such pressures. History also indicates that the vitality of great world religions survived such efforts. In any event, under our Constitution it is not open to the governments of this Union to reinforce the loyalty of their citizens by deciding who is the true exponent of their religion.

Finally, we are told that the present Moscow Patriarchate is not the true superior church of the American communicants. The vicissitudes of war and revolution which have beset the Moscow Patriarchate since 1917 are said to have resulted in a discontinuity which divests the present Patriarch of his authority over the American church. Both parties to the present controversy agree that the present Patriarch is the legitimately chosen holder of his office, and the account of the proceedings and pronouncements of the American schismatic group so indicates. Even were there doubt about this it is hard to see by what warrant the New York legislature is free to substitute its own judgment as to the validity of Patriarch Alexi's claim and to disregard acknowledgment of the present Patriarch by his coequals in the Eastern Confession, the Patriarchs of Constantinople, Alexandria, Antioch, and Jerusalem, and by religious leaders throughout the world, including the present Archbishop of York.[4]

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lics [those refusing to adhere to the newly-promulgated dogma of papal infallibility] in such parishes as those in which the majority consisted of their sympathisers, for certain hours of the day . . . ." Laski, *op. cit. supra,* note 2, at 256–258. Bismarck's *Kulturkampf,* of which these laws were a part, is fully discussed in Goyau, *Bismarck et l'Église.* A full text of the laws may be found in the appendix to that work.

[4] See Garbett, In an Age of Revolution, 207–213; Niemöller, Why I Went to Moscow, The Christian Century, March 19, 1952, p. 338.

These considerations undermine the validity of the New York legislation in that it enters the domain of religious control barred to the States by the Fourteenth Amendment.

MR. JUSTICE BLACK agrees with this opinion on the basis of his view that the Fourteenth Amendment makes the First Amendment applicable to the States.

MR. JUSTICE DOUGLAS, while concurring in the opinion of the Court, also joins this opinion.

MR. JUSTICE JACKSON, dissenting.

New York courts have decided an ordinary ejectment action involving possession of New York real estate in favor of the plaintiff, a corporation organized under the Religious Corporations Law of New York under the name "Saint Nicholas Cathedral of the Russian Orthodox Church in North America." Admittedly, it holds, and since 1925 has held, legal title to the Cathedral property. The New York Court of Appeals decided that it also has the legal right to its possession and control.

The appellant Benjamin's defense against this owner's demand for possession and the basis of his claimed right to enjoy possession of property he admittedly does not own is set forth in his answer to the ejectment suit in these words: "Said premises pursuant to the above rules of the Russian Orthodox Church are held in trust for the benefit of the accredited Archbishop of the said Archdiocese, to be possessed, occupied and used by said Archbishop as his residence, as a place for holding religious services, and other purposes related to his office and as the seat and headquarters for the administration, by him, of the affairs of the Archdiocese both temporal and spiritual." And, says the appellant Benjamin, he is that Archbishop. These allegations are denied, and they define the issues as tendered to the state courts.

I greatly oversimplify the history of this controversy to indicate its nature rather than to prove its merits. This Cathedral was incorporated and built in the era of the Czar, under the regime of a state-ridden church in a church-ridden state. The Bolshevik Revolution may have freed the state from the grip of the church, but it did not free the church from the grip of the state. It only brought to the top a new master for a captive and submissive ecclesiastical establishment. By 1945, the Moscow patriarchy had been reformed and manned under the Soviet regime and it sought to re-establish in other countries its prerevolutionary control of church property and its sway over the minds of the religious. As the Court's opinion points out, it demanded of the Russian Church in America, among other things, that it abstain "from political activities against the U. S. S. R." The American Cathedral group, along with others, refused submission to the representative of the Moscow Patriarch, whom it regarded as an arm of the Soviet Government. Thus, we have an ostensible religious schism with decided political overtones.

If the Fourteenth Amendment is to be interpreted to leave anything to the courts of a state to decide without our interference, I should suppose it would be claims to ownership or possession of real estate within its borders and the vexing technical questions pertaining to the creation, interpretation, termination, and enforcement of uses and trusts, even though they are for religious and charitable purposes. This controversy, I believe, is a matter for settlement by state law and not within the proper province of this Court.

I.

As I read the prevailing opinions, the Court assumes that some transfer of control has been accomplished by legislation which results in a denial of due process. This,

of course, would raise a question of deprivation of *property,* not of *liberty,* while only the latter issue is raised by the parties. And it could be sustained only by a finding by us that the legislation worked a transfer rather than a confirmation of property rights. The Court of Appeals seems to have regarded the statute merely as a legislative reaffirmation of principle the Court would find to be controlling in its absence.

But this Court apparently thinks that by mere enactment of the statute the legislature invaded a field of action reserved to the judiciary. However desirable we may think a rigid separation of powers to be (and I, for one, think it is basic in the Federal Government), I do not think the Fourteenth Amendment undertakes to control distribution of powers within the states. At all events, I do not think we are warranted in holding that New York may not enact this legislation in question, which is in form and in substance an amendment of its Religious Corporations Law.

Nothing in New York law required this denomination to incorporate its Cathedral. The Religious Corporations Law of the State expressly recognizes unincorporated churches (§ 2) and undertakes no regulation of them or their affairs. But this denomination wanted the advantages of a corporate charter for its Cathedral, to obtain immunity from personal liability and other benefits. This statute does not interfere with religious freedom but furthers it. If they elect to come under it, the statute makes separate provision for each of many denominations with corporate controls appropriate to its own ecclesiastical order. When it sought the privilege of incorporation under the New York law applicable to its denomination, it seems to me that this Cathedral and all connected with its temporal affairs were submitted to New York law.

As a consequence of this Court's decision in *Dartmouth College* v. *Woodward,* 4 Wheat. 518, the Constitution of

New York since 1846 has authorized the legislature to create corporations by general laws and special acts, subject, however, to a reservation that all such acts "may be altered from time to time or repealed." New York Const., Art. X, § 1. That condition becomes a part of every corporate charter subsequently granted by New York. *Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212, 87 N. E. 443; *People* v. *Gass,* 190 N. Y. 323, 83 N. E. 64; *Pratt Institute* v. *New York,* 183 N. Y. 151, 75 N. E. 1119.

What has been done here, as I see it, is to exercise this reserved power which permits the State to alter corporate controls in response to the lessons of experience. Of course, the power is not unlimited and could be so exercised as to deprive one of property without due process of law. But, I do not think we can say that a legislative application of a principle so well established in our common law as the *cy-pres* doctrine is beyond the powers reserved by the New York Constitution.

II.

The Court holds, however, that the State cannot exercise its reserved power to control this property without invading religious freedom, because it is a Cathedral and devoted to religious uses. I forbear discussion of the extent to which restraints imposed upon Congress by the First Amendment are transferred against the State by the Fourteenth Amendment beyond saying that I consider that the same differences which apply to freedom of speech and press (see dissenting opinion in *Beauharnais* v. *Illinois,* 343 U. S. 250, 287) are applicable to questions of freedom of religion and of separation of church and state.

It is important to observe what New York has not done in this case. It has not held that Benjamin may not act as Archbishop or be revered as such by all who will follow him. It has not held that he may not have a Cathedral.

Indeed, I think New York would agree that no one is more in need of spiritual guidance than the Soviet faction. It has only held that this cleric may not have a particular Cathedral which, under New York law, belongs to others. It has not interfered with his or anyone's exercise of his religion. New York has not outlawed the Soviet-controlled sect nor forbidden it to exercise its authority or teach its dogma in any place whatsoever except on this piece of property owned and rightfully possessed by the Cathedral Corporation.

The fact that property is dedicated to a religious use cannot, in my opinion, justify the Court in sublimating an issue over property rights into one of deprivation of religious liberty which alone would bring in the religious guaranties of the First Amendment. I assume no one would pretend that the State cannot decide a claim of trespass, larceny, conversion, bailment or contract, where the property involved is that of a religious corporation or is put to religious use, without invading the principle of religious liberty.

Of course, possession of the property will help either side that obtains it to maintain its prestige and to continue or extend its sway over the minds and souls of the devout. So would possession of a bank account, an income-producing office building, or any other valuable property. But if both claimants are religious corporations or personalities, can not the State decide the issues that arise over ownership and possession without invading the religious freedom of one or the other of the parties?

Thus, if the American group, which owns the title to the Cathedral, had by force barred Benjamin from entering it physically, would the Court say it was an interference with religious freedom to entertain and decide his ejectment action? If state courts are to decide such controversies at all instead of leaving them to be settled by a show of force, is it constitutional to decide for only

one side of the controversy and unconstitutional to decide for the other? In either case, the religious freedom of one side or the other is impaired if the temporal goods they need are withheld or taken from them.

As I have earlier pointed out, the Soviet Ecclesiast's claim, denial of which is said to be constitutional error, is not that this New York property is impressed with a trust by virtue of New York law. The claim is that it is impressed with a trust by virtue of the rules of the Russian Orthodox Church. This Court so holds.

I shall not undertake to wallow through the complex, obscure and fragmentary details of secular and ecclesiastical history, theology, and canon law in which this case is smothered. To me, whatever the canon law is found to be and whoever is the rightful head of the Moscow patriarchate, I do not think New York law must yield to the authority of a foreign and unfriendly state masquerading as a spiritual institution. (See "The Soviet Propaganda Program," Staff Study No. 3, Senate Subcommittee on Overseas Information Programs of the United States, 82d Cong., 2d Sess.)

I have supposed that a State of this Union was entirely free to make its own law, independently of any foreign-made law, except as the Full Faith and Credit Clause of the Constitution might require deference to the law of a sister state or the Supremacy Clause require submission to federal law. I do not see how one can spell out of the principles of separation of church and state a doctrine that a state submit property rights to settlement by canon law. If there is any relevant inference to be drawn, I should think it would be to the contrary, though I see no obstacle to the state allowing ecclesiastical law to govern in such a situation if it sees fit. I should infer that from the trend of such decisions as *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487; *Griffin* v. *McCoach,* 313 U. S. 498.

The only ground pressed upon this appeal is that the judgment below violates the religious freedom guaranteed by the Fourteenth Amendment. I find this contention so insubstantial that I would dismiss the appeal. Whether New York has arrived at the correct solution of this question is a matter on which its own judges have disagreed. But they have disagreed within the area which is committed to them for agreement or disagreement and I find nothing which warrants our invading their jurisdiction.

MANDOLI *v.* ACHESON, SECRETARY OF STATE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15. Argued October 17, 1952.—Decided November 24, 1952.

1. Under the Expatriation Act of 1907, a United States citizen by birth who by foreign law derives from his parents citizenship of a foreign nation *held* not to have lost his United States citizenship by foreign residence long continued after attaining his majority. Pp. 135–139.

   (a) In such case the native-born citizen, by continuing to reside in the foreign country after attaining his majority, cannot be deemed to have elected between his dual citizenships in favor of that of the foreign country; and, when he attained his majority, he was under no statutory duty to make an election and to return to this country for permanent residence if he elected United States citizenship. Pp. 135–139.

   (b) *Perkins* v. *Elg*, 307 U. S. 325, is not to the contrary. Pp. 138–139.

   (c) The dignity of citizenship which the United States Constitution confers as a birthright upon every person born within its protection is not to be withdrawn or extinguished by the courts except pursuant to a clear statutory mandate. P. 139.

2. One of the grounds of decision relied on by the District Court, based on the citizen's having served in the army of the foreign country and taken an oath of allegiance to that country, was abandoned by the Government, the Attorney General having ruled that such service and oath had been taken under legal compulsion amounting to duress. P. 135.

90 U. S. App. D. C. 1121, 193 F. 2d 920, reversed.

In an action brought by petitioner to establish his citizenship, the District Court gave judgment against him. The Court of Appeals affirmed. 90 U. S. App. D. C. 1121, 193 F. 2d 920. This Court granted certiorari. 343 U. S. 976. *Reversed,* p. 139.

Jack Wasserman argued the cause for petitioner. With him on the brief were *Gaspare Cusumano* and *Harry Meisel.*

Oscar H. Davis argued the cause for respondent. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *John R. Wilkins.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case presents but a single question, upon which petitioner and the Government are substantially agreed that the judgment of the Court of Appeals should be reversed.[1] Does a United States citizen by birth who by foreign law derives from his parents citizenship of a foreign nation lose his United States citizenship by foreign residence long continued after attaining his majority?

Petitioner Mandoli was born in this country, of unnaturalized Italian parents. These circumstances made him a citizen of the United States by virtue of our Constitution and a national of Italy by virtue of Italian law. While he was a suckling, his parents returned to Italy taking him with them. At about the age of fifteen, he sought to come to the United States; but permission was refused by the American Consul at Palermo upon the ground that he was too young to take the journey unaccompanied.

In 1931, Mandoli saw brief service in the Italian army. In 1937, being 29 or 30 years of age, he attempted to come to the United States, but was rejected because of such army service. He renewed the effort in 1944, with the same result. In 1948, he was granted a certificate of identity which permitted him to enter the United

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[1] Certiorari was granted without opposition, 343 U. S. 976.

States for prosecution of an action to establish his citizenship.

Judgment in the District Court went against him on the ground that expatriation had resulted from two causes: first, contrary to his contentions, it found that his service in the Italian army was voluntary and that he then took an oath of allegiance to the King of Italy; second, that he continued to reside in Italy after attaining his majority, thereby electing between his dual citizenships in favor of that of Italy.[2]

The Government abandoned the first ground because the Attorney General ruled that such service in the Italian army by one similarly situated could "only be regarded as having been taken under legal compulsion amounting to duress." He said, "The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all."[3] The Court of Appeals, however, relying largely on *Perkins* v. *Elg,* 307 U. S. 325, affirmed upon the ground that failure to return to the United States upon the attainment of his majority operated to extinguish petitioner's American citizenship.[4] We conclude that Mandoli has not lost his citizenship.

It would be as easy as it would be unrewarding to point out conflict in precept and confusion in practice on this side of the Atlantic, where ideas of nationality and expatriation were in ferment during the whole Nineteenth Century. Reception of the common law confronted American courts with a doctrine that a national allegiance into which one was born could be renounced only with consent of his sovereign. European rulers, losing subjects (particularly seamen) to the New World, adhered fiercely to the old doctrine. On the other hand, the

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[2] D. C. opinion not reported.

[3] 41 Op. Atty. Gen., Op. No. 16.

[4] 90 U. S. App. D. C. 1121, 193 F. 2d 920.

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United States, prospering from the migrant's freedom of choice, became champion of the individual's right to expatriate himself, for which it contended in diplomacy and fought by land and by sea. However, this personal freedom of expatriation was not always recognized by our own courts, because of their deference to common-law precedent. Finally, Congress, by the Act of July 27, 1868, declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness" and that "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." [5]

But this statute left unanswered many questions as to the overt acts that would effect a voluntary expatriation by our own citizens or would cause an involuntary forfeiture of citizenship. Prior to 1907, courts and administrators were left to devise their own answers.

Preparatory to legislative action on the subject, Congress sought and received a report of a special citizenship board. Reviewing judicial decisions, this report concluded that the courts recognized well-established doctrines of election in cases dealing with rights of persons with dual citizenship. This board recommended that Congress follow what it assumed to be established decisional law and enact, among other things, that expatriation be assumed as to any citizen who became domiciled in a foreign state, with a rebuttable presumption of foreign domicile from five years of residence in a foreign state.[6] This was proposed as to all citizens and not

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[5] 15 Stat. 223, 8 U. S. C. § 800.

[6] H. R. Doc. No. 326, 59th Cong., 2d Sess., p. 23; see also 74, 79, 160 *et seq.*

merely those possessing dual citizenship. Congress, however, instead of accepting this broad doctrine of expatriation, by the Expatriation Act of 1907 limited the presumption of expatriation from foreign residence to the case of naturalized but not of native-born citizens.[7]

If petitioner, when he became of full age in 1928, were under a statutory duty to make an election and to return to this country for permanent residence if he elected United States citizenship, that duty must result from the 1907 Act then applicable. In the light of the foregoing history, we can find no such obligation imposed by that Act; indeed, it would appear that the proposal to impose that duty was deliberately rejected.[8]

The Nationality Act of 1940,[9] though not controlling here, shows the consistency of congressional policy not to subject a citizen by birth to the burden and hazard of election at majority. This comprehensive revision and codification of the laws relating to citizenship and nationality was prepared at the request of Congress by the Departments of State, Justice and Labor. The State Department proposed a new provision requiring an American-born national taken during minority to the country of his other nationality to make an election and to return to the United States, if he elected American nationality, on reaching majority. The Departments of Justice and Labor were opposed and, as a consequence, it was omitted from the proposed bill. This disagreement between the Departments was called to the attention of the Con-

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[7] 34 Stat. 1228.

[8] Administrative practice, when involving protections abroad, involves very different policy considerations and is not controlling here. However, while not always consistent, it seems to have settled to the rule we apply in this case. 3 Hackworth, Digest of International Law, 371; see also Nielsen, Some Vexatious Questions Relating to Nationality, 20 Col. L. Rev. 840, 854.

[9] 8 U. S. C., c. 11.

gress.[10] While in some other respects Congress enlarged the grounds for loss of nationality, it refused to require a citizen by nativity to elect between dual citizenships upon reaching a majority.[11]

The Court of Appeals, however, applied such a rule because it understood that this Court, in *Perkins* v. *Elg, supra,* had declared it to be the law. Miss Elg was American-born, of naturalized parents Swedish in origin. They took her to Sweden when she was but four years old, where she remained during her nonage. By virtue of a Swedish-American Treaty of 1869, this resumption of residence in Sweden repatriated the parents, which carried with it Swedish citizenship for their minor child. Under the Act of 1907, any American citizen is deemed expatriated if naturalized in a foreign state in conformity with its laws. Undoubtedly, Miss Elg had become naturalized under the laws of Sweden. But it was not by any act of her own or within her control, and about eight months after she became twenty-one, she sought and obtained an American passport and returned to this country where she resided for something over five years. American immigration officials then decided that her derivative naturalization had deprived her of American citizenship and put their harsh and technical doctrine to test by instituting proceedings to deport her. That case did not present and the Court could not properly have decided any question as to consequences of a failure to elect American citizenship, for Miss Elg promptly did so elect and decisively evidenced it by resuming residence here. What it held was that citizenship conferred by our Constitution upon a child born under its protection cannot be forfeited because

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[10] See Hearings before House of Representatives Committee on Immigration and Naturalization on H. R. 9980, 76th Cong., 1st Sess., p. 32.

[11] See also § 350 of Pub. L. No. 414, 82d Cong., 2d Sess., 66 Stat. 163, 269.

the citizen during nonage is a passive beneficiary of foreign naturalization proceedings. It held that Miss Elg had acquired a derivative dual-citizenship but had not suffered a derivative expatriation. In affirming her right to return to and remain in this country, it did not hold that it was mandatory for her to do so.

We find no warrant in the statutes for concluding that petitioner has suffered expatriation. And, since Congress has prescribed a law for this situation, we think the dignity of citizenship which the Constitution confers as a birthright upon every person born within its protection is not to be withdrawn or extinguished by the courts except pursuant to a clear statutory mandate.[12] The judgment of the Court of Appeals should be reversed, with directions to remand the case to the District Court for the entry of an order declaring that the petitioner is a citizen of the United States.

Reversed and so ordered.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE CLARK concur, dissenting.

At the times relevant here Congress made the taking of "an oath of allegiance to any foreign state" the ground for loss of American citizenship. 34 Stat. 1228, 8 U. S. C. § 17. The findings of the District Court in this case state that "On May 24, 1931, the plaintiff took an oath of allegiance to the King of Italy." That finding is uncontroverted here and the precise circumstances surrounding the taking of the oath are unexplained. All we know is that plaintiff, without protest, was inducted into the

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[12] The question of whether the statutory grounds under the 1940 Act exclude other acts that will amount to voluntary expatriation was reserved in *Kawakita* v. *United States*, 343 U. S. 717, 730–732. It is not present in this case.

Italian Army and served there from April 14, 1931, to September 5, 1931.

If we are to base our decision on the record, we would be compelled to affirm. For it is plain that petitioner did take an oath of allegiance to a foreign state. The Court, however, ignores the record and rests on an opinion of the Attorney General in another case (cf. MR. JUSTICE JACKSON concurring, *McGrath* v. *Kristensen,* 340 U. S. 162, 176), saying that one who took an oath in the Army of Fascist Italy did so under duress. We have no basis for knowing that every inducted soldier who took an oath in Mussolini's army did so under duress. For all we know, this American citizen took the oath freely and gladly. At least, he took it. If we acted in the role of Secretary of State or Attorney General, we might exercise our discretion in favor of the citizen and decide not to move against him on such a showing. But we sit not as cabinet officers but as judges to decide cases on the facts of the records before us.

BROWN ET AL. v. BOARD OF EDUCATION OF TOPEKA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

No. 8. November 24, 1952.

This is an appeal from a decision of the District Court sustaining the constitutionality of a state statute which authorized racial segregation in the public schools of Kansas. In the District Court the State intervened and defended the constitutionality of the statute; but neither the State, nor any of the other appellees, has entered an appearance or filed a brief here. Because of the importance of the issue, this Court requests that the State present its views at the oral argument. If the State does not desire to appear, the Attorney General of the State is requested to advise this Court whether the State's default shall be construed as a concession of the invalidity of the statute. Pp. 141–142.

The decision below is reported in 98 F. Supp. 797.

Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, George E. C. Hayes, George M. Johnson, William R. Ming, Jr., James M. Nabrit, Jr. and *Frank D. Reeves* for appellants.

PER CURIAM.

This action was instituted by the appellants attacking a Kansas statute which authorized segregation in the schools of that State. It was urged that the State of Kansas was without power to enact such legislation, claimed by appellants to be in contravention of the Fourteenth Amendment.

In the District Court, the State, by its Governor and Attorney General, intervened and defended the constitutionality of the statute. The court upheld its validity.

In this Court, the appellants continue their constitutional attack. No appearance has been entered here by

the State of Kansas, the Board of Education of Topeka, and the other appellees; nor have they presented any brief in support of the statute's validity. The Court has been advised by counsel for the Board of Education that it does not propose to appear in oral argument or present a brief.

Because of the national importance of the issue presented and because of its importance to the State of Kansas, we request that the State present its views at oral argument. If the State does not desire to appear, we request the Attorney General to advise whether the State's default shall be construed as a concession of invalidity.

DIXON *v.* DUFFY, WARDEN.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 4. Argued October 16, 1951.—Continued November 5, 1951.—Further continued May 12, 1952.—Decided December 8, 1952.

In a state court, petitioner was convicted of a crime and sentenced to imprisonment. He did not appeal, but petitioned the State Supreme Court for habeas corpus, which was denied without opinion. This Court granted certiorari because of a serious claim that petitioner had been deprived of his rights under the Federal Constitution. At the bar of this Court, the State Attorney General argued that the State Supreme Court's judgment rested on an adequate state ground. After twice continuing the cause on its docket to enable petitioner's counsel to obtain from the State Supreme Court a determination as to whether its judgment was intended to rest upon an adequate state ground, this Court is now informed that the State Supreme Court considers that it has no jurisdiction to render such a determination. *Held:*

1. To the end that the doubt as to the jurisdiction of this Court to review the judgment of the State Supreme Court may be resolved, that judgment is vacated and the cause is remanded for further proceedings. Pp. 144–146.

2. A new judgment may be entered, and petitioner may also be informed by an official determination from the State Supreme Court whether or not that judgment rests on an adequate state ground. Pp. 144–146.

Judgment vacated and cause remanded.

Petitioner's application for a writ of habeas corpus was denied by the Supreme Court of California without opinion. This Court granted certiorari. 341 U. S. 938. *Judgment vacated and cause remanded,* p. 146.

Franklin C. Stark, acting under appointment by the Court, argued the cause and filed a brief for petitioner.

Clarence A. Linn, Assistant Attorney General of California, argued the cause for respondent. With him on the brief were *Edmund G. Brown,* Attorney General, and *Howard S. Goldin,* Deputy Attorney General.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This case originated on October 21, 1950, when petitioner, a prisoner in San Quentin, filed an application for a writ of habeas corpus in the Supreme Court of California. That court, summarily, but with two dissents, denied the application. To review this decision, petitioner applied to this Court for certiorari. The Court granted the petition, 341 U. S. 938, and thereafter appointed counsel to represent the petitioner. 342 U. S. 805.

The Attorney General of California appeared for respondent. At the bar of this Court, he argued that the judgment of the Supreme Court of California rested on an adequate nonfederal ground. Admitting that habeas corpus is ordinarily an available means to California prisoners to challenge the constitutionality of the proceedings which resulted in their incarceration, the Attorney General told us that the writ was unavailable in this particular case, to this particular petitioner because he could have and should have presented his federal claim in an appeal from his original conviction. Counsel for petitioner vigorously opposed this contention, insisting that habeas corpus was an available remedy under California law, that the federal question was properly before the court.

This Court, of course, does not sit to determine matters of state law; nor is it the appropriate forum to resolve the argument raised by the earnest objections of the Attorney General of California.

Accordingly, we followed our precedents.[1] We continued the cause "for such period" as would "enable counsel for petitioner to secure a *determination* from the

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[1] *Loftus* v. *Illinois,* 334 U. S. 804 (1948); *Herb* v. *Pitcairn,* 324 U. S. 117 (1945).

Supreme Court of California as to whether the judgment herein was intended to rest on an adequate independent state ground or whether decision of the federal claim was necessary to the judgment rendered." 342 U. S. 33, 34. (Emphasis supplied.)

Counsel for petitioner, in December 1951, duly filed in the Supreme Court of California a "Petition for Determination of Basis of Judgment" which requested an expression by that court on the issue raised by our order. Subsequently, the Clerk of this Court received a letter from the Clerk of the Supreme Court of California relative to this question. But we received no official determination of the issue from the Supreme Court of California.

We could not regard the letter from the Clerk of the Supreme Court of California as a "sufficient 'determination' of the question raised in our order of November 5, 1951." Therefore, on May 12, 1952, we "further continued" the cause on our docket to enable counsel for petitioner to secure from the Supreme Court of California its official determination as requested by our earlier order. 343 U. S. 393.

Though some months have now elapsed, we still have received no advice from the Supreme Court of California. We are informed, however, that the California court advised petitioner's counsel informally that it doubted its jurisdiction to render such a determination. And, although counsel subsequently submitted briefs to the contrary, the California court again informed counsel, through its Clerk, that it was powerless, for want of jurisdiction, to issue any further official expression on the case. It appears, then, that so long as this cause continues on our docket, counsel cannot procure that which we asked him to procure.

We granted certiorari in this case "because of a serious claim that petitioner had been deprived of his rights under the Federal Constitution." 342 U. S. 33. This Court,

alone, is the final arbiter of such a claim, and our grant of certiorari should entitle petitioner to the chance to have the matter resolved by this Court—provided that the state judgment was not based on an adequate state ground. If the state judgment was based on an adequate state ground, the Court, of course, would be without jurisdiction to pass upon the federal question. Doubt has since arisen that such jurisdiction exists. These circumstances should not now act to deprive petitioner of his day in this Court,[2] but they do require that we take scrupulous care, as we have so often done before,[3] to determine our jurisdiction. This involves further delay, and in this case further delay is regrettable. But delay is necessary unless we are to resolve the jurisdictional issue by simply assuming the nonexistence of an adequate state ground though in fact one may exist.

To the end that the doubt in this case may be resolved, we vacate the judgment of the Supreme Court of California and remand the cause for further proceedings. A new judgment may be entered, and petitioner also may be informed by an official determination from the Supreme Court of California whether or not that judgment rests on an adequate state ground.[4]

So ordered.

MR. JUSTICE JACKSON, dissenting.

Both the wisdom and the legality of this policy toward the highest court of a state appear dubious to me. What we are doing, in essence, is to vacate a state court judg-

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[2] See *Neilson* v. *Lagow*, 12 How. 98, 109–110 (1852).

[3] See, *e. g.*, *Jennings* v. *Illinois*, 342 U. S. 104 (1951); *Loftus* v. *Illinois*, *supra*; *Herb* v. *Pitcairn*, *supra*. *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); *Honeyman* v. *Hanan*, 300 U. S. 14 (1937).

[4] Cf. *Jennings* v. *Illinois*, *supra*; *Minnesota* v. *National Tea Co.*, *supra*; *Honeyman* v. *Hanan*, *supra*.

ment, not because it is found to be inconsistent with federal law, but because the state court has not told us, with an acceptable degree of formality, what reasons led to rendering it.

This Court has blazed the way for the practice of dispensing with opinions in denying petitions for discretionary orders, such as certiorari and motions for leave to file petitions for habeas corpus. Unless we mean to impose on state courts a burden we are unwilling to assume ourselves, we should not vacate this state judgment. Doubt of our jurisdiction is no justification for exercising it; quite the contrary is the rule.

Those few of the cases cited by the Court in which this procedure was followed are not persuasive. There was no examination of the Court's power to vacate, and the results do not encourage its repetition. In two cases, the judgment vacated was simply reinstated by the State Supreme Court and the litigants were never heard from again. Compare *Minnesota* v. *National Tea Co.,* 309 U. S. 551, with *National Tea Co.* v. *State,* 208 Minn. 607, 294 N. W. 230; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, with *Van Cott* v. *State Tax Comm'n,* 98 Utah 264, 96 P. 2d 740. In another instance, however, we pursued a less drastic course; we stayed our own hand while petitioner applied to the state court for clarification of its grounds of decision. Compare *Herb* v. *Pitcairn,* 324 U. S. 117, with *id.,* 325 U. S. 77.

In this case, the Supreme Court of California, having promptly and officially, albeit informally, advised us of its ground of decision, feels itself without power to make a formal order therein. One reason is that it has long since closed the case with a final determination, and another is that we, by grant of certiorari, have lifted the case, record and all, out of that court. I cannot say that it is unreasonable for a state court to refrain from enter-

ing formal orders in a case which is no longer pending before it.

The plain truth of the matter is that the grant of certiorari was an irresponsible exercise of our own power without requiring or considering adequate jurisdictional information. The California Supreme Court has a perfect right to deny an application for habeas corpus to review a contention that under state practice could have, and should have, been urged on appeal. We are without power to require states to allow retrial *de novo* via habeas corpus of issues tried and open to review on the original record. It seems to me probable that this is the ground the California Supreme Court has taken, not, as this Court intimates, for this particular case, but as a general rule of state law, and I think a wise and proper one. It probably will reaffirm by reinstating the judgment we upset today. I think dismissal of our own writ of certiorari on the candid admission that it was improvidently granted is our wise and lawful course.

UNITED STATES *v.* CALTEX (PHILIPPINES), INC. ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 16. Argued October 20, 1952.—Decided December 8, 1952.

In the circumstances of this case, the wartime destruction of private property by the Army to prevent its imminent capture and use by an advancing enemy did not entitle the owner to compensation under the Fifth Amendment. Pp. 150–156.

(a) Whether or not the principle laid down in *United States* v. *Pacific R. Co.*, 120 U. S. 227, was dictum when enunciated, this Court holds that it is the law today. Pp. 153–154.

(b) *Mitchell* v. *Harmony*, 13 How. 115, and *United States* v. *Russell*, 13 Wall. 623, distinguished. Pp. 152–153.

(c) A different result is not required by the fact that the Army exercised "deliberation" in singling out this property, in "requisitioning" it from its owners, and in exercising "control" over it before destroying it, nor by the fact that the destruction was effected prior to withdrawal. Pp. 154–155.

120 Ct. Cl. 518, 100 F. Supp. 970, reversed.

In a suit to recover compensation under the Fifth Amendment for property destroyed by the Army in wartime to prevent its use by the enemy, the Court of Claims gave judgment for the plaintiffs. 120 Ct. Cl. 518, 100 F. Supp. 970. This Court granted certiorari. 343 U. S. 955. *Reversed*, p. 156.

Assistant Attorney General Baldridge argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Robert W. Ginnane, Paul A. Sweeney* and *Benjamin Forman.*

Albert R. Connelly argued the cause for the Shell Company of Philippine Islands, Ltd. et al., and *Leo T. Kissam* for Caltex (Philippines), Inc., respondents. They also were on a brief for respondents.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Each of the respondent oil companies owned terminal facilities in the Pandacan district of Manila at the time of the Japanese attack upon Pearl Harbor. These were used to receive, handle and store petroleum products from incoming ships and to release them for further distribution throughout the Philippine Islands. Wharves, rail and automotive equipment, pumps, pipe lines, storage tanks, and warehouses were included in the property on hand at the outbreak of the war, as well as a normal supply of petroleum products.

News of the Pearl Harbor attack reached Manila early in the morning of December 8, 1941. On the same day, enemy air attacks were mounted against our forces in the Philippines, and thereafter the enemy launched his amphibious assault.

On December 12, 1941, the United States Army, through its Chief Quartermaster, stationed a control officer at the terminals. Operations continued at respondents' plants, but distribution of the petroleum products for civilian use was severely restricted. A major share of the existing supplies was requisitioned by the Army.

The military situation in the Philippines grew worse. In the face of the Japanese advance, the Commanding General on December 23, 1941, ordered the withdrawal of all troops on Luzon to the Bataan Peninsula. On December 25, 1941, he declared Manila to be an open city. On that same day, the Chief Engineer on the staff of the Commanding General addressed to each of the oil companies letters stating that the Pandacan oil depots "are requisitioned by the U. S. Army." The letters further stated: "Any action deemed necessary for the destruction of this property will be handled by the U. S. Army." An engineer in the employ of one of the com-

panies was commissioned a first lieutenant in the Army Corps of Engineers to facilitate this design.

On December 26, he received orders to prepare the facilities for demolition. On December 27, 1941, while enemy planes were bombing the area, this officer met with representatives of the companies. The orders of the Chief Engineer had been transmitted to the companies. Letters from the Deputy Chief of Staff, by command of General MacArthur, also had been sent to each of the oil companies, directing the destruction of all remaining petroleum products and the vital parts of the plants. Plans were laid to carry out these instructions, to expedite the removal of products which might still be of use to the troops in the field, and to lay a demolition network about the terminals. The representatives of Caltex were given, at their insistence, a penciled receipt for all the terminal facilities and stocks of Caltex.

At 5:40 p. m., December 31, 1941, while Japanese troops were entering Manila, Army personnel completed a successful demolition. All unused petroleum products were destroyed, and the facilities were rendered useless to the enemy. The enemy was deprived of a valuable logistic weapon.

After the war, respondents demanded compensation for all of the property which had been used or destroyed by the Army. The Government paid for the petroleum stocks and transportation equipment which were either used or destroyed by the Army, but it refused to compensate respondents for the destruction of the Pandacan terminal facilities. Claiming a constitutional right under the Fifth Amendment [1] to just compensation for these terminal facilities, respondents sued in the Court of Claims. Recovery was allowed. 120 Ct. Cl. 518, 100 F.

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[1] ". . . nor shall private property be taken for public use, without just compensation."

Supp. 970. We granted certiorari to review this judgment. 343 U. S. 955.

As reflected in the findings of the Court of Claims, there were two rather distinct phases of Army operations in the Pandacan district in December 1941. While the military exercised considerable control over the business operations of respondents' terminals during the period between December 12 and December 26, there was not, according to the findings below, an assumption of actual physical or proprietary dominion over them during this period.[2] Bound by these findings, respondents do not now question the holding of the Court of Claims that prior to December 27 there was no seizure for which just compensation must be paid.

Accordingly, it is the legal significance of the events that occurred between December 27 and December 31 which concerns us. Respondents concede that the Army had a right to destroy the installations. But they insist that the destruction created a right in themselves to exact fair compensation from the United States for what was destroyed.

The argument draws heavily from statements by this Court in *Mitchell* v. *Harmony,* 13 How. 115 (1852), and *United States* v. *Russell,* 13 Wall. 623 (1871). We agree that the opinions lend some support to respondents' view.[3]

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[2] At one point shortly after the outbreak of the war, the Army contemplated leasing respondents' facilities. But this plan was never put into effect. Respondents continued to operate the plants themselves up to December 26, 1941.

[3] In the *Russell* case, *supra,* the Court said, 13 Wall., at 627–628: "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. . . . Exigencies of the kind do arise in time of war or

But the language in those two cases is far broader than the holdings. Both cases involved equipment which had been impressed by the Army for subsequent use by the Army. In neither was the Army's purpose limited, as it was in this case, to the sole objective of destroying property of strategic value to prevent the enemy from using it to wage war the more successfully.

A close reading of the *Mitchell* and *Russell* cases shows that they are not precedent to establish a compensable taking in this case. Nor do those cases exhaust all that has been said by this Court on the subject. In *United States* v. *Pacific R. Co.*, 120 U. S. 227 (1887), Mr. Justice Field, speaking for a unanimous Court, discussed the question at length. That case involved bridges which had been destroyed during the War Between the States by a retreating Northern Army to impede the advance of the Confederate Army.[4] Though the point was not directly involved, the Court raised the question of whether this act constituted a compensable taking by the United States and answered it in the negative:

> "The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance

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impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

[4] The narrow issue in the case was whether, after the Army rebuilt the bridges it had previously destroyed, the Army could charge for the expense of the rebuilding. On this issue the Court held for the railroad.

> of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss." [5]

It may be true that this language also went beyond the precise questions at issue. But the principles expressed were neither novel nor startling, for the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.[6] And what was said in the *Pacific Railroad* case was later made the basis for the holding in *Juragua Iron Co.* v. *United States,* 212 U. S. 297 (1909), where recovery was denied to the owners of a factory which had been destroyed by American soldiers in the field in Cuba because it was thought that the structure housed the germs of a contagious disease.

Therefore, whether or not the principle laid down by Mr. Justice Field was dictum when he enunciated it, we hold that it is law today. In our view, it must govern in this case. Respondents and the majority of the Court of Claims, arguing to the contrary, have placed great emphasis on the fact that the Army exercised "deliberation" in singling out this property, in "requisitioning" it from its owners, and in exercising "control" over it before devastating it. We need not labor over these labels; it may be

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[5] 120 U. S., at 234.

[6] For earlier cases expressing such principles see, *e. g.*, *Bowditch* v. *Boston,* 101 U. S. 16, 18–19 (1879); *Respublica* v. *Sparhawk,* 1 Dall. 357 (1788); *Parham* v. *The Justices,* 9 Ga. 341, 348–349 (1851). See also 2 Kent's Commentaries (14th ed.) 338.

that they describe adequately what was done, but they do not show the legal consequences of what was done. The "requisition" involved in this case was no more than an order to evacuate the premises which were slated for demolition. The "deliberation" behind the order was no more than a design to prevent the enemy from realizing any strategic value from an area which he was soon to capture.

Had the Army hesitated, had the facilities only been destroyed after retreat, respondents would certainly have no claims to compensation. The Army did not hesitate. It is doubtful that any concern over the legal niceties of the situation entered into the decision to destroy the plants promptly while there was yet time to destroy them thoroughly.[7] Nor do we think it legally significant that the destruction was effected prior to withdrawal. The short of the matter is that this property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use. It was destroyed that the United States might better and sooner destroy the enemy.

The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war,

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[7] Cf. *Respublica* v. *Sparhawk, supra,* where the following appears, 1 Dall., at 363:

"We find, indeed, a memorable instance of folly recorded in the 3 *Vol. of Clarendon's History,* where it is mentioned, that the *Lord Mayor* of *London,* in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt."

and not to the sovereign.[8] No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts. But the general principles laid down in the *Pacific Railroad* case seem especially applicable here. Viewed realistically, then, the destruction of respondents' terminals by a trained team of engineers in the face of their impending seizure by the enemy was no different than the destruction of the bridges in the *Pacific Railroad* case. Adhering to the principles of that case, we conclude that the court below erred in holding that respondents have a constitutional right to compensation on the claims presented to this Court.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I have no doubt that the military had authority to select this particular property for destruction. But whatever the weight of authority may be, I believe that the Fifth Amendment requires compensation for the taking. The property was destroyed, not because it was in the nature of a public nuisance, but because its destruction was deemed necessary to help win the war. It was as clearly appropriated to that end as animals, food, and supplies requisitioned for the defense effort. As the Court says, the destruction of this property deprived the enemy of a valuable logistic weapon.

It seems to me that the guiding principle should be this: Whenever the Government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.

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[8] *Lichter* v. *United States*, 334 U. S. 742, 787–788 (1948); *Bowles* v. *Willingham*, 321 U. S. 503, 517–519 (1944); *Omnia Commercial Co.* v. *United States*, 261 U. S. 502 (1923).

LLOYD A. FRY ROOFING CO. *v.* WOOD ET AL., MEMBERS OF THE ARKANSAS PUBLIC SERVICE COMMISSION.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 37. Argued November 10, 1952.—Decided December 8, 1952.

Petitioner manufactures in Tennessee products which it sends in trucks to customers in nearby states. Finding that driver-owners carrying those products in Arkansas, who allegedly had leased their vehicles to petitioner, were in reality transporting petitioner's goods as "contract carriers" for which a state Act required a permit, the State Supreme Court dismissed petitioner's bill praying that enforcement of the Act be enjoined. Neither petitioner nor the drivers had obtained any kind of authority from the Interstate Commerce Commission. *Held:*

1. The finding of the State Supreme Court that the driver-owners were in reality transporting petitioner's goods as contract carriers is not without factual foundation and is accepted by this Court. Pp. 159–160.

2. The State's requirement of a permit in such circumstances is not an undue burden on interstate commerce, and does not conflict with the Commerce Clause of the Federal Constitution nor with the Federal Motor Carrier Act. Pp. 161–163.

3. *Buck* v. *Kuykendall,* 267 U. S. 307, distinguished. Pp. 161–162.

4. It is unnecessary here to consider apprehended burdensome conditions which the State has not attempted to enforce. Pp. 162–163.

5. The State is not without power to require interstate motor carriers to identify themselves as users of the State's highways. P. 163.

219 Ark. 553, 244 S. W. 2d 147, affirmed.

In an action brought by petitioner in an Arkansas state court to enjoin enforcement of the Arkansas Motor Carrier Act, the State Supreme Court ordered dismissal of the bill. 219 Ark. 553, 244 S. W. 2d 147. This Court granted certiorari. 343 U. S. 962. *Affirmed,* p. 163.

Glenn M. Elliott argued the cause for petitioner. With him on the brief was *James W. Wrape.*

John R. Thompson and *Eugene R. Warren* submitted on brief for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, Lloyd A. Fry Roofing Company, manufactures asphalt roofing products in Memphis, Tennessee, and sends them in trucks to customers in nearby states. Some of these trucks are driven by their owners who have allegedly leased them to the petitioner. Five of these driver-owners while carrying Fry's interstate shipments on Arkansas highways were arrested for having failed to obtain a permit as required of all contract carriers by § 11 of the Arkansas Motor Act.[1] Petitioner brought this action in an Arkansas state court to enjoin the state's Public Service Commission from further molestation or prosecution of the drivers. The bill asserted both state and federal grounds for denying that the state law could be applied to require a permit. The state grounds alleged were: Neither petitioner Fry Roofing Company nor the truck drivers could be required to get a state permit, because the state law exempted "private" carriers from that duty, and petitioner was such a "private carrier"—that is, a commercial enterprise, carrying its own products exclusively in its own leased trucks operated by its own bona fide driver-employees. Since, petitioner claimed, the drivers were its bona fide employees, it necessarily followed that they need not get

[1] "No person shall engage in the business of a contract carrier by motor vehicle over any public highway in this State unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to engage in such business. . . ." Ark. Acts 1941, No. 367, at 937, 947–948.

state permits as "contract carriers" because they were not in the business of transporting goods for hire.[2] The federal ground asserted by petitioner to prevent application of the state statute was that requiring either Fry or the drivers to get state permits would unduly burden interstate commerce in violation of the United States Constitution and would invade a field of regulation pre-empted by the Federal Motor Carrier Act.[3]

Answering the bill, the State Commission asked the court to dismiss it, strongly urging that petitioner's alleged lease of trucks and operation of them by its own employees were mere pretenses, a subterfuge to enable petitioner and others to evade and escape the regulatory provisions of the Arkansas Motor Act. After lengthy hearings the trial court found that the arrested drivers were in fact bona fide employees of petitioner, that the truck leases were also bona fide, and that petitioner was therefore transporting its own goods as a private carrier exempt from the state Act. For this reason the court held that the Act did not require either petitioner or its drivers to get a permit. Accordingly the Commission was enjoined as prayed. Reviewing the facts for itself the State Supreme Court found that the arrested truck

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[2] The State Act's definition of a contract carrier is:

"The term 'contract carrier by motor vehicle' means any person, not a common carrier included under Paragraph 7, Section 5 (a) of this Act, who or which, under individual contracts or agreements, and whether directly or indirectly or by a lease of equipment or franchise rights, or any other arrangement, transports passengers or property by motor vehicle for compensation." Ark. Acts 1941, No. 367, § 5 (a) (8). Compare definition in the United States Motor Carrier Act, Part II of the Interstate Commerce Act, 49 U. S. C. § 303 (15).

[3] 49 Stat. 543, as amended, 54 Stat. 919, 49 U. S. C. §§ 301 *et seq.* The Federal Act contention was not specifically referred to in the original bill, but was urged in, considered and rejected by the State Supreme Court.

drivers were not petitioner's employees, that the truck lease arrangements were shams, and that petitioner was therefore a shipper—not a carrier of any kind. In this situation the court found that the driver-owners were in reality transporting petitioner's goods as "contract carriers" for hire, engaged in the very kind of business for which § 11 of the state Act required a permit. The court then dismissed the bill and denied a rehearing, thereby rejecting the federal questions raised. 219 Ark. 553, 244 S. W. 2d 147. Certiorari was granted because of the Commerce Clause and Federal Motor Carrier Act questions. 343 U. S. 962.

We are urged to set aside the findings of the State Supreme Court before passing upon the constitutional questions presented. Petitioner contends that these findings are without evidential support and that the subsidiary findings do not support the ultimate conclusion that the leases were shams. Whether rejection of these findings would place petitioner's Commerce Clause contentions in a more favorable position, we need not consider. For there is much record evidence, both oral and written, some of which tends to support petitioner's contention of good-faith arrangements and some the contrary. Some details of petitioner's conduct resemble and some details differ from patterns of conduct found by courts in other cases to have been contrived to avoid legal regulation. See, *e. g., United States* v. *La Tuff Transfer Service,* 95 F. Supp. 375, and cases there cited. There are no exceptional circumstances of any kind that would justify us in rejecting the Supreme Court's findings; they are not without factual foundation, and we accept them.

The finding that the arrested drivers own and operate the trucks for hire makes them contract carriers as defined in the State Act. Section 11 of that Act requires contract carriers to get a permit and outlines certain considerations

the State Commission may weigh in granting or refusing the permit. Among these matters is the adequacy of transportation services already being performed by "any railroad, street railway or motor carrier." Refusal of a state certificate based on such grounds was held to be an unconstitutional obstruction of interstate commerce in *Buck* v. *Kuykendall,* 267 U. S. 307. To deny these interstate carriers an Arkansas permit for such reasons would conflict with the *Buck* holding.

Unlike the situation in the *Buck* case, Arkansas has not refused to grant a permit for interstate carriage of goods on state highways. It has asked these driver-owners to do nothing except apply for a permit as contract carriers are required to do by the State Act. And the State Commission here expressly disclaims any "discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce." The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency.[4] Such an identification is necessary, the Commission urges, in order that it may properly apply the state's valid police, welfare, and safety regulations to motor carriers using its highways. Nor is there any showing whatever that the Commission has attempted or will attempt to attach any burdensome conditions to the grant of a permit, or conditions that would in any manner

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[4] "It appeared that while the Act calls the certificate one of 'public convenience and necessity,' the Commission had recognized, before this suit was begun, that, . . . it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiffs a certificate upon application and compliance with other provisions of the law." *Clark* v. *Poor,* 274 U. S. 554, 556. In the *Clark* case this Court affirmed an order dismissing the bill. See *Columbia Terminals Co.* v. *Lambert,* 30 F. Supp. 28, 32, and 309 U. S. 620.

conflict with the National Motor Carrier Act or any Interstate Commerce Commission regulations issued thereunder. Moreover, the Arkansas Act imposes upon its Commission the duty of reconciling state regulation with that of the Interstate Commerce Commission, just as the Interstate Commerce Act requires federal officials to cooperate with the states and their duly authorized state officials. Here neither petitioner nor the drivers have obtained any kind of authority from the Interstate Commerce Commission. Indeed, petitioner's whole case has been built on the premise that neither it nor the drivers must get a permit from the state or the national regulatory agency. In this situation our prior cases make clear that a state can regulate so long as no undue burden is imposed on interstate commerce, and that a mere requirement for a permit is not such a burden.[5] It will be time enough to consider apprehended burdensome conditions when and if the state attempts to impose and

[5] In *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, the District Court upheld a Missouri statute reading: "It is hereby declared unlawful for any motor carrier . . . to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit so to do. . . ." *Buck* v. *Kuykendall*, 267 U. S. 307, was held not to require the statute's invalidation, since Missouri had not refused to grant a permit on the ground that the state had power to say what interstate commerce would benefit the state and what would not. Agreeing with this constitutional holding, we ordered the complaint dismissed. 309 U. S. 620. See also *Eichholz* v. *Public Service Comm'n*, 306 U. S. 268, 273–274; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 84, 85; *Maurer* v. *Hamilton*, 309 U. S. 598, affirming 336 Pa. 17, 7 A. 2d 466; *McDonald* v. *Thompson*, 305 U. S. 263, affirming 95 F. 2d 937; *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177. Cf. *Buck* v. *Kuykendall*, 267 U. S. 307, and *Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 538.

enforce them. At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways.

Affirmed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BURTON and MR. JUSTICE MINTON join, dissenting.

Whether the driver-owners involved here are contract or private carriers is immaterial to the determination of the federal question presented. That question is whether Arkansas can require a person engaged exclusively in the interstate transportation of goods by motor carrier to obtain a certificate of necessity and convenience from Arkansas. That is precisely what Arkansas has required, as made clear by the opinion of the State Supreme Court in the instant case. The Court said,

"We are of the opinion that the driver-owners involved in this litigation were *contract carriers*" (as defined in the Arkansas statute) and ". . . and that they were therefore required to have a Certificate of Necessity and Convenience from the Arkansas Public Service Commission." 219 Ark. 553, 557, 244 S. W. 2d 147, 149.

The label "Certificate of Necessity and Convenience" is more accurate than the word "permit," for the Arkansas law makes the grant of permission dependent upon a consideration of the following factors:[1] "the reliability and financial condition of the applicant"—his "sense of responsibility toward the public"—"the transportation service being maintained by any railroad, street railway

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[1] The relevant parts of § 11 of Act No. 367, Ark. Acts 1941, pp. 947–949, are as follows:

"(a) No person shall engage in the business of a contract carrier by motor vehicle over any public highway in this State unless there

or motor carrier"—"the likelihood of the proposed service being permanent and continuous throughout twelve months of the year"—"the effect which such proposed transportation service may have upon existing transpor-

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is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to engage in such business. . . .

. . . . . .

"(c) Subject to this Act a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the application or from any hearing held thereon, that the applicant is fit, willing, and able to properly perform the service of a contract carrier by motor vehicle and to conform to the provisions of this Act and the lawful requirements, rules and regulations of the Commission, and the proposed operation, to the extent authorized by the permit, will promote the public interest and the policy declared in Section Two (2) of this Act; otherwise such application shall be denied. . . .

. . . . . .

"(e) In granting applications for permits, the Commission shall take into consideration the reliability and financial condition of the applicant and his sense of responsibility toward the public; the transportation service being maintained by any railroad, street railway or motor carrier; the likelihood of the proposed service being permanent and continuous throughout twelve months of the year, and the effect which such proposed transportation service may have upon existing transportation service; and any other matters tending to show the necessity or want of necessity for granting said application.

"(f) The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under this Act; provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

tation service"—"any other matters tending to show the necessity or want of necessity for granting said application." The permit will issue if it appears that "the applicant is fit, willing, and able" properly to perform the service and if the proposed operation "will promote the public interest" and the policy of the Act.[2]

This statute is a regulation of interstate commerce, not a regulation of the use of Arkansas' highways. It is precisely the kind of control which the State of Washington tried to exercise over motor carriers and which was denied her by *Buck* v. *Kuykendall,* 267 U. S. 307. As Mr. Justice Brandeis, speaking for the Court in that case, said, the effect of this kind of state regulation is "not merely to burden but to obstruct" interstate commerce. *Id.,* at 316.

State regulations in the interest of safety, the exaction of a fee for highway maintenance, and the like are of a different character. See *Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 189, and cases cited. So is a requirement that an interstate carrier get a permit to do intrastate business. See *Eichholz* v. *Commission,* 306 U. S. 268.

The certificate or permit exacted here is one authorizing an interstate contract carrier "to engage in such business." Until today no state could impose any such condition on one engaged exclusively in interstate commerce. Until today such a certificate was the concern solely of the Interstate Commerce Commission. Congress gave the Commission authority to regulate interstate contract carriers (49 U. S. C. § 304 (a)(2)). Congress made it mandatory for them to obtain a permit to do business (*id.,* § 309). It gave the Commission broad powers of investigation over these carriers (*id.,* § 304 (c)), provided for injunctions against violations (*id.,* § 322 (b)), and imposed

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[2] § 11, note 1, *supra.*

criminal sanctions (*id.*, § 322 (a)). There is no phase of the operation, which Arkansas in this action seeks to regulate, that Congress has left untouched. It is the Interstate Commerce Commission that must determine whether this leasing operation is bona fide or a sham, whether the carriers are private interstate carriers requiring no permit or interstate contract carriers requiring one. Congress in other words has pre-empted the field, precluding both inconsistent and overlapping state regulations.[3] See *Hines* v. *Davidowitz*, 312 U. S. 52; *Hill* v. *Florida*, 325 U. S. 538; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218; *Bethlehem Steel Co.* v. *State Board*, 330 U. S. 767; *La Crosse Tel. Corp.* v. *Wisconsin Board*, 336 U. S. 18; *Plankinton Packing Co.* v. *Wisconsin Board*, 338 U. S. 953; *Automobile Workers* v. *O'Brien*, 339 U. S. 454.

[3] *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, whose ruling we sustained, 309 U. S. 620, is not in point. The Interstate Commerce Commission had ruled in that case that the particular operations there involved were not covered by the Federal Act. See 30 F. Supp., at 30.

ALISON *v.* UNITED STATES.

NO. 79. CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued November 12, 1952.—Decided December 8, 1952.

Sections 23 (e) and (f) of the Internal Revenue Code provide that, in computing net income for the purpose of the federal income tax, there shall be allowed as deductions "losses sustained during the taxable year." Treasury Regulations provide that "A loss from theft or embezzlement occurring in one year and discovered in another is ordinarily deductible for the year in which sustained." *Held:*

1. Whether and when a deductible loss results from an embezzlement is a factual question, a practical one to be decided according to surrounding circumstances. Pp. 169–170.

2. Under the special factual circumstances found by the District Courts in the two cases here involved, the taxpayers were entitled, under the Code provisions and the Treasury Regulations, to deductions for the year in which the embezzlement losses were discovered and their amounts ascertained. Pp. 168–170.

97 F. Supp. 959, reversed; 98 F. Supp. 252, affirmed.

No. 79. In an action for a refund of income taxes, the District Court gave judgment against the taxpayer. 97 F. Supp. 959. The Court of Appeals certified a question to this Court, which ordered the entire record sent up. *Reversed,* p. 170.

No. 80. In an action for a refund of income taxes, the District Court gave judgment for the taxpayer. 98 F. Supp. 252. The Court of Appeals certified a question to this Court, which ordered the entire record sent up. *Affirmed,* p. 170.

Karl E. Weise argued the cause for Alison in No. 79. With him on the brief was *Paul Kern Hirsch.*

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*Together with No. 80, *United States* v. *Stevenson-Chislett, Inc.,* also on certificate from the same court.

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Hilbert P. Zarky argued the cause for the United States in Nos. 79 and 80. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Lyon, Ellis N. Slack* and *Lee A. Jackson.*

David B. Buerger argued the cause for Stevenson-Chislett, Inc. in No. 80. With him on the brief was *George M. Heinitsh, Jr.*

Mr. Justice Black delivered the opinion of the Court.

The questions in these two income tax cases are so much alike that they can be treated in one opinion. Both taxpayers had moneys embezzled by trusted agents and employees. As usual, the defalcations had been going on for many years before they were discovered. On discovery, efforts were made immediately to identify the takers and fix the dates and amounts of the thefts. In the *Alison* case, No. 79, the books revealed the thief and the precise amounts taken each year from 1931 to 1940. In No. 80, *Stevenson-Chislett, Inc.,* the cover-up had been so successful that painstaking investigation failed to reveal who took the funds or the time when the unascertained person or persons took them. Each taxpayer claimed a tax deduction for the year the losses were discovered and their amounts ascertained. The Government objected, claiming that the deduction should have been taken in each of the prior years during which the moneys were being surreptitiously taken. In the *Stevenson-Chislett* case, the District Court held that the uncertain circumstances of the embezzlement entitled the taxpayer to take its losses the year the loss was discovered and the amount ascertained. 98 F. Supp. 252. The District Judge decided the other way in the *Alison* case and denied her declarations. 97 F. Supp. 959. His holding, however, was not in accord with his own views, but was compelled, he thought, by the Third Circuit's decision in

First National Bank of Sharon, Pa. v. *Heiner,* 66 F. 2d 925. The Court of Appeals for the Third Circuit certified to us the question of deductibility in both cases. Pursuant to 28 U. S. C. § 1254 (3), we ordered the complete records sent up so that we might decide the entire matters in controversy.

Internal Revenue Code, §§ 23 (e) and (f) authorize deductions for ". . . losses sustained during the taxable year. . . ." The Government reads this section as requiring a taxpayer to take a deduction for loss from embezzlement in the year in which the theft occurs, even though inability to discover in time might completely deprive the taxpayer of the benefit of this statutory deduction. Only at the time the money is stolen, so it is argued, is a loss "sustained." But Treasury practice itself belies this rigid construction. For more than thirty years the Regulations have provided that "A loss from theft or embezzlement occurring in one year and discovered in another is *ordinarily* deductible for the year in which sustained." 26 CFR § 29.43–2. (Emphasis supplied.) Information contained in a letter from the Commissioner attached as an appendix to the Government's brief cites many instances in which the Treasury has allowed deductions for embezzlement losses in years subsequent to those in which the thefts occurred. Apparently the Department has felt constrained to do this in order to prevent hardships and injustice. These have been departures from the "ordinary" rule of attributing embezzlement losses to the year of theft.

This Treasury practice evidently stems at least in part from the special nature of the crime of embezzlement. Its essence is secrecy. Taxpayers are usually well aware of all the circumstances of financial losses for which tax deductions are allowed. Not so when a trusted adviser or employee steals. For years his crime may be known only to himself. He may take money planning to return

it and he may return it before there is discovery. Furthermore, the terms embezzlement and loss are not synonymous. The theft occurs, but whether there is a loss may remain uncertain. One whose funds have been embezzled may pursue the wrongdoer and recover his property wholly or in part. See *Commissioner* v. *Wilcox,* 327 U. S. 404. Events in the *Alison* case show the practical value of this right of recovery. A substantial proportion of the embezzled funds was recovered in 1941, ten years after the first embezzlement occurred. This recovery alone is ample refutation of the view that a loss is inevitably "sustained" at the very time an embezzlement is committed.

Whether and when a deductible loss results from an embezzlement is a factual question, a practical one to be decided according to surrounding circumstances. See *Boehm* v. *Commissioner,* 326 U. S. 287. An inflexible rule is not needed; the statute does not compel it. For years the Treasury has administered the tax law under regulations saying that deductions shall "ordinarily" be taken in the year of embezzlement. Ordinarily does not mean always.

We hold that the special factual circumstances found by the District Courts in both these cases justify deductions under I. R. C., §§ 23 (e) and (f) and the long-standing Treasury Regulations applicable to embezzlement losses. See *Boston Consolidated Gas Co.* v. *Commissioner,* 128 F. 2d 473; *Gwinn Bros. & Co.* v. *Commissioner,* 7 T. C. 320. Accordingly, the judgment in No. 79 is reversed and the judgment in No. 80 is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON dissent.

BAILESS, COUNTY TREASURER, ET AL. *v.* PAUKUNE.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 242. Submitted November 10, 1952.—Decided Dec. 8, 1952.

Under the General Allotment Act of February 8, 1887, a trust patent to land in Oklahoma was issued to an Apache Indian. He died, leaving a will devising an undivided interest in the allotment to his widow. No fee patent had been issued and the trust period had not expired. *Held:* If the widow is not an Indian, her interest is subject to state taxation. Pp. 171–173.

206 Okla. 527, 244 P. 2d 1137, reversed and remanded.

Respondent sued in an Oklahoma state court to enjoin state taxation of her undivided interest in a trust patent for land issued to her deceased Indian husband. Without determining whether the widow was an Indian, the trial court held that the interest was not taxable, and the Supreme Court of Oklahoma affirmed. 206 Okla. 527, 244 P. 2d 1137. This Court granted certiorari. 344 U. S. 812. *Reversed and remanded,* p. 173.

R. L. Lawrence and *R. F. Barry* submitted on brief for petitioners.

Reford Bond, Jr. submitted on brief for respondent.

Acting Solicitor General Stern filed a memorandum for the United States, as *amicus curiae,* supporting petitioners.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1901 an Apache Indian, Paukune, was issued a trust patent to land in Caddo County, Oklahoma. This allotment was made under the General Allotment Act of Feb-

ruary 8, 1887, 24 Stat. 388, 389.[1] Paukune died testate in 1919, leaving a wife Juana and a son Jose. By his will he devised an undivided one-third interest in the allotment to his widow and an undivided two-thirds interest to his son. No fee patent to the land has issued to Paukune, to his widow, or to the son. The trust period of twenty-five years has from time to time been extended. In other words, the United States still holds the land in trust for Paukune and his heirs.

In 1947 Juana's undivided one-third interest was assessed for ad valorem taxes in the amount of $21.33 and was advertised for sale for failure to pay. She thereupon instituted this suit in the Oklahoma courts to enjoin the sale and any further levy of ad valorem taxes on the theory that the land was exempt from state taxation. The petitioners answered, alleging that Juana was a non-Indian and therefore not exempt from the taxes. The

[1] Section 5 of the Act provides in part as follows: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided . . . ."

trial court, without determining whether the widow was an Indian, held her interest nontaxable by the state; and the Supreme Court of Oklahoma affirmed, 206 Okla. 527, 244 P. 2d 1137, saying it mattered not under federal law whether the widow was Indian or non-Indian. The case is here on certiorari. 344 U. S. 812.

Levindale Lead Co. v. *Coleman,* 241 U. S. 432, dealt with restrictions on alienation attached to land under the Osage Indian Allotment Act of June 28, 1906, 34 Stat. 539. The Court held that the policy of that Act did not embrace persons who were not Indians, since the Congress sought to protect only those toward whom it owed the duties of a guardian. The same answer must be given here. If Juana is not an Indian, the United States has no interest of hers in the land to protect.[2] True, the United States holds the legal title to the land. But nothing in the Act prevents the devolution of the equitable interest to the widow. If she is not within the class whom Congress sought to protect, the trust is a dry and passive one; there remains only a ministerial act for the trustee to perform, namely the issuance of a fee patent to the *cestui.*

The judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion.

So ordered.

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[2] And see *Mixon* v. *Littleton,* 265 F. 603; *Unkle* v. *Wills,* 281 F. 29, 35.

UNITED STATES *v.* CARDIFF.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 27. Argued November 17, 1952.—Decided December 8, 1952.

It is not an offense under §§ 301 (f) and 704 of the Federal Food, Drug, and Cosmetic Act for the president of a corporation operating a factory engaged in packing and preparing food for interstate distribution to refuse to grant permission for inspectors of the Food and Drug Administration to enter and inspect the factory at reasonable times. Pp. 174–177.

194 F. 2d 686, affirmed.

Respondent was convicted of a violation of § 301 (f) of the Federal Food, Drug, and Cosmetic Act. 95 F. Supp. 206. The Court of Appeals reversed. 194 F. 2d 686. This Court granted certiorari. 343 U. S. 940. *Affirmed,* p. 177.

James L. Morrisson argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Murray, Carl H. Imlay* and *William W. Goodrich.*

John Lichty argued the cause and filed a brief for respondent.

Mr. Justice Douglas delivered the opinion of the Court.

Respondent was convicted of violating § 301 (f) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. § 331 (f). That section prohibits "The refusal to permit entry or inspection as authorized by section 704." [1] Section 704 authorizes the federal officers or employees "after first making request and obtaining permis-

[1] The violation is made a misdemeanor by 21 U. S. C. § 333.

sion of the owner, operator, or custodian" of the plant or factory "to enter" and "to inspect" the establishment, equipment, materials and the like "at reasonable times." [2]

Respondent is president of a corporation which processes apples at Yakima, Washington, for shipment in interstate commerce. Authorized agents applied to respondent for permission to enter and inspect his factory at reasonable hours. He refused permission, and it was that refusal which was the basis of the information filed against him and under which he was convicted and fined. 95 F. Supp. 206. The Court of Appeals reversed, holding that § 301 (f), when read with § 704, prohibits a refusal to permit entry and inspection only if such permission has previously been granted. 194 F. 2d 686. The case is here on certiorari. 343 U. S. 940.

The Department of Justice urges us to read § 301 (f) as prohibiting a refusal to permit entry or inspection at any reasonable time. It argues that that construction is needed if the Act is to have real sanctions and if the benign purposes of the Act are to be realized. It points out that factory inspection has become the primary investigative device for enforcement of this law, that it is from factory inspections that about 80 percent of the violations are discovered, that the small force of inspectors makes factory inspection, rather than random sampling

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[2] Section 704 reads as follows: "For purposes of enforcement of this Act, officers or employees duly designated by the Administrator, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein."

of finished goods, the only effective method of enforcing the Act.

All that the Department says may be true. But it does not enable us to make sense out of the statute. Nowhere does the Act say that a factory manager must allow entry and inspection at a reasonable hour. Section 704 makes entry and inspection conditioned on "making request and obtaining permission." It is that entry and inspection which § 301 (f) backs with a sanction. It would seem therefore on the face of the statute that the Act prohibits the refusal to permit inspection only if permission has been previously granted. Under that view the Act makes illegal the revocation of permission once given, not the failure to give permission. But that view would breed a host of problems. Would revocation of permission once given carry the criminal penalty no matter how long ago it was granted and no matter if it had no relation to the inspection demanded? Or must the permission granted and revoked relate to the demand for inspection on which the prosecution is based? Those uncertainties make that construction pregnant with danger for the regulated business. The alternative construction pressed on us is equally treacherous because it gives conflicting commands. It makes inspection dependent on consent and makes refusal to allow inspection a crime. However we read § 301 (f) we think it is not fair warning (cf. *United States* v. *Weitzel,* 246 U. S. 533; *McBoyle* v. *United States,* 283 U. S. 25) to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a

man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon* v. *Lowry*, 301 U. S. 242.

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE BURTON dissents.

MONTGOMERY BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. *v.* LEDBETTER ERECTION CO., INC.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 43. Argued November 13, 1952.—Decided December 8, 1952.

Respondent filed a bill in equity in an Alabama state court to enjoin certain picketing activities, wholly peaceful, carried on by petitioner labor organizations. The court forthwith issued a temporary injunction. Subsequently a motion by petitioners to dissolve the temporary injunction was denied by the trial court, and its order was affirmed by the State Supreme Court. *Held:* The judgment of the State Supreme Court was not a "final" judgment within the meaning of 28 U. S. C. § 1257, and therefore was not reviewable by this Court. Pp. 179–181.

(a) The fact that as long as a temporary injunction is in force it may be as effective as a permanent injunction, and that appeals from interlocutory judgments have for that reason been authorized by state legislatures and in some circumstances by Congress, does not give interlocutory judgments the aspect of finality required by 28 U. S. C. § 1257. Pp. 180–181.

(b) Since there was no final judgment of the State Supreme Court reviewable here, the writ of certiorari which was granted in this case is dismissed as improvidently granted. P. 181.

Writ of certiorari dismissed.

An order of an Alabama state court denying petitioners' motion to dissolve a temporary injunction against certain picketing activities of petitioners, was affirmed by the State Supreme Court. 256 Ala. 678, 57 So. 2d 112, rehearing denied, 256 Ala. 689, 57 So. 2d 121. This Court granted certiorari. 343 U. S. 962. *Writ dismissed as improvidently granted,* p. 181.

Herbert S. Thatcher argued the cause for petitioners. With him on the brief were *J. Albert Woll, James A. Glenn, Joseph E. Finley* and *Earl McBee.*

By special leave of Court, *Mozart G. Ratner* argued the cause for the National Labor Relations Board, as *amicus curiae,* urging reversal. With him on the brief were *Acting Solicitor General Stern, Marvin E. Frankel, George J. Bott, David P. Findling* and *Bernard Dunau.*

Jack Crenshaw argued the cause for respondent. With him on the brief was *Files Crenshaw.*

Arthur J. Goldberg filed a brief for the Congress of Industrial Organizations, as *amicus curiae,* supporting petitioners.

MR. JUSTICE MINTON delivered the opinion of the Court.

The respondent filed a bill in equity in the Circuit Court of Montgomery County, Alabama, to enjoin certain picketing activities, wholly peaceful, carried on by the petitioners, labor organizations. Upon the sworn bill and without notice, the court issued forthwith a "Temporary Writ of Injunction." The petitioners appeared and filed an answer and a motion to dissolve the injunction on numerous grounds. Subsequently, the petitioners withdrew their answer and most of the grounds assigned for dissolution of the injunction and filed new grounds therefor. The motion to dissolve was denied, and from this order of the court the petitioners appealed to the Supreme Court of Alabama, which affirmed the order of the trial court. 256 Ala. 678, 57 So. 2d 112, rehearing denied, 256 Ala. 689, 57 So. 2d 121. Certiorari was sought here and granted, 343 U. S. 962.

At the very threshold, we are presented with a question of jurisdiction. This Court may grant certiorari from a judgment or decree of the Supreme Court of Alabama, the highest court in the State, only if the judgment or decree is final. 28 U. S. C. § 1257. Was this a final judgment or decree?

From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case. In *Gibbons* v. *Ogden,* 6 Wheat. 448, the first case presenting this issue to this Court, an injunction had been granted by a Chancery Court of the State of New York. The defendant answered and moved to dissolve the injunction. The court denied the motion to dissolve, and the defendant appealed to the Court for the Trial of Impeachments and Correction of Errors which affirmed. The appeal to this Court was dismissed because there was no final decree in the court of last resort for this Court to review.

The provision of § 1257 that only "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . ." has been carried in almost identical language since the Judiciary Act of 1789, 1 Stat. 85, § 25.

> "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 124.

The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in *Gibbons* v. *Ogden, supra.* There is no room here for interpretation. The rule remains unchanged.

True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari. *Baldwin Co.* v. *Howard Co.,* 256 U. S. 35, 40.

It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that. Furthermore, the interlocutory decree could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case.

Since there was no final judgment of the Supreme Court of Alabama for review, the writ of certiorari must be dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The question presented is the *power* of the state court to issue a temporary injunction in this kind of labor dispute. If petitioners had sought mandamus or another appropriate state writ directed against the judge who issued the temporary injunction, I should have no doubt that it would be a final judgment which we would review. See *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 14. Cf. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 565. I see no difference of substance between that case and this. The mischief of temporary injunctions in labor controversies is well known. It is done when the interlocutory order is issued. The damage is often irreparable. The assertion by the state court of *power* to act in an interlocutory way is final. Whether it has that *power* may be determined without reference to any future proceedings which may be taken. Unless the rule of finality is to be

purely mechanical, which to date it has not been (see *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 124), we should determine now whether the National Labor Relations Act permits a state court to interfere with a labor controversy in a way, which though interim in form, irretrievably alters the status of the dispute or in fact settles it.*

*This "practical" rather than "technical" construction is as necessary here as it is in cases involving appeals from "final decisions" in the federal system. See *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545–546.

WIEMAN ET AL. *v.* UPDEGRAFF ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 14. Argued October 16, 1952.—Decided December 15, 1952.

Oklahoma Stat. Ann., 1950, Tit. 51, §§ 37.1–37.8 (1952 Supp.), requires each state officer and employee, as a condition of his employment, to take a "loyalty oath," stating, *inter alia*, that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as "communist front" or "subversive." As construed by the Supreme Court of Oklahoma, it excludes persons from state employment solely on the basis of membership in such organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged. *Held:* As thus construed, the Act violates the Due Process Clause of the Fourteenth Amendment. Pp. 184–192.

(a) The Due Process Clause does not permit a state, in attempting to bar disloyal persons from its employment on the basis of organizational membership, to classify innocent with knowing association. *Adler* v. *Board of Education,* 342 U. S. 485; *Gerende* v. *Board of Supervisors,* 341 U. S. 56; and *Garner* v. *Board of Public Works,* 341 U. S. 716, distinguished. Pp. 188–191.

(b) The protection of the Due Process Clause extends to a public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Adler* v. *Board of Education,* 342 U. S. 485, and *United Public Workers* v. *Mitchell,* 330 U. S. 75, distinguished. Pp. 191–192.

205 Okla. 301, 237 P. 2d 131, reversed.

The Supreme Court of Oklahoma affirmed the judgment of a trial court sustaining the constitutionality of Okla. Stat. Ann., 1950, Tit. 51, §§ 37.1–37.8 (1952 Supp.), and enjoining payment of salaries to state employees who had refused to subscribe to the "loyalty oath" required by that Act. 205 Okla. 301, 237 P. 2d 131. On appeal to this Court, *reversed,* p. 192.

H. D. Emery argued the cause for appellants. With him on the brief was *Robert J. Emery.*

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Fred Hansen, First Assistant Attorney General of Oklahoma, argued the cause for the Board of Regents of the Oklahoma Agricultural Colleges et al., appellees. With him on the brief was *Mac Q. Williamson,* Attorney General.

Paul W. Updegraff argued the cause and filed a brief *pro se.*

Osmond K. Fraenkel filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is an appeal from a decision of the Supreme Court of Oklahoma upholding the validity of a loyalty oath [1] prescribed by Oklahoma statute for all state officers and

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[1] "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means; That I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; nor do I advocate revolution, teach or justify a program of sabotage, force or violence, sedition or treason, against the Government of the United States or of this State; nor do I advocate directly or indirectly, teach or justify by any means whatsoever, the overthrow of the Government of the United States or of this State, or change in the form of Government thereof, by force

employees. Okla. Stat. Ann., 1950, Tit. 51, §§ 37.1–37.8 (1952 Supp.). Appellants, employed by the State as members of the faculty and staff of Oklahoma Agricultural and Mechanical College, failed, within the thirty days permitted, to take the oath required by the Act. Appellee Updegraff, as a citizen and taxpayer, thereupon brought this suit in the District Court of Oklahoma County to enjoin the necessary state officials from paying further compensation to employees who had not subscribed to the oath. The appellants, who were permitted to intervene, attacked the validity of the Act on the grounds, among others, that it was a bill of attainder; an *ex post facto* law; impaired the obligation of their contracts with the State and violated the Due Process Clause of the Fourteenth Amendment. They also sought a mandatory injunction directing the state officers to pay

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or any unlawful means; that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization, or of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means;

"And I do further swear (or affirm) that during such time as I am

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(Here put name of office, or, if an employee,) insert 'An employee

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of' followed by the complete designation of the employing officer,

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office, agency, authority, commission, department or institution.

"I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means."

their salaries regardless of their failure to take the oath. Their objections centered largely on the following clauses of the oath:

> ". . . That I am not affiliated directly or indirectly . . . with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; . . . that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of . . . any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization . . . ."

The court upheld the Act and enjoined the state officers from making further salary payments to appellants. The Supreme Court of Oklahoma affirmed, *sub nom. Board of Regents* v. *Updegraff,* 205 Okla. 301, 237 P. 2d 131 (1951).[2] We noted probable jurisdiction because of the public importance of this type of legislation and the recurring serious constitutional questions which it presents.

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[2] The state officials named as defendants in Updegraff's suit took the position in the state courts that the statute was unconstitutional. Following a policy of the Oklahoma Attorney General not to appeal from adverse decisions of the state supreme court, these defendants are here only because they were made appellees by the appellant-intervenors. They have chosen in their brief merely to restate, without argument, their position in the court below.

The District Court of Oklahoma County in holding the Act valid concluded that the appellants were compelled to take the oath as written; that the appellants "and each of them, did not take and subscribe to the oath as provided in section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated." In affirming, the Supreme Court of Oklahoma held that the phrase of the oath "any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" actually "refers to a list or lists of such organizations in existence at the time of the passage of the act which had been prepared by the Attorney General [of the United States] under governmental directive. Such list or lists are in effect made a part of the oath by reference." On this point the opinion continues: "There is no requirement in the act that an oath be taken of nonmembership in organizations not on the list of the Attorney General of the United States at the time of the passage of this act."

We read this part of the highest state court's decision as limiting the organizations proscribed by the Act to those designated on the list or lists of the Attorney General which had been issued prior to the effective date of the Act. Although this interpretation discarded clear language of the oath as surplusage, the court denied the appellants' petition for rehearing which included a plea that refusal of the court to permit appellants to take the oath as so interpreted was violative of due process.

The purpose of the Act, we are told, "was to make loyalty a qualification to hold public office or be employed by the State." 205 Okla., at 305, 237 P. 2d, at 136.

During periods of international stress, the extent of legislation with such objectives accentuates our traditional concern about the relation of government to the individual in a free society. The perennial problem of defining that relationship becomes acute when disloyalty is screened by ideological patterns and techniques of disguise that make it difficult to identify. Democratic government is not powerless to meet this threat, but it must do so without infringing the freedoms that are the ultimate values of all democratic living. In the adoption of such means as it believes effective, the legislature is therefore confronted with the problem of balancing its interest in national security with the often conflicting constitutional rights of the individual.

In a series of cases coming here in recent years, we have had occasion to consider legislation aimed at safeguarding the public service from disloyalty. *Garner* v. *Board of Public Works,* 341 U. S. 716 (1951); *Adler* v. *Board of Education,* 342 U. S. 485 (1952); *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951). It is in the context of these decisions that we determine the validity of the oath before us.

Garner involved a Los Angeles ordinance requiring all city employees to swear that they did not advocate the overthrow of the government by unlawful means or belong to organizations with such objectives. The ordinance implemented an earlier charter amendment which disqualified from municipal employment all persons unable to take such an oath truthfully. One of the attacks made on the oath in that case was that it violated due process because its negation was not limited to organizations known by the employee to be within the proscribed class. This argument was rejected because we felt justified in assuming that *scienter* was implicit in each clause of the oath.

Adler also indicated the importance of determining whether a rule of exclusion based on association applies to innocent as well as knowing activity. New York had sought to bar from employment in the public schools persons who advocate, or belong to organizations which advocate, the overthrow of the government by unlawful means. The Feinberg Law directed the New York Board of Regents to make a listing, after notice and hearing, of organizations of the type described. Under § 3022 of the statute, the Regents provided by regulation that membership in a listed organization should be *prima facie* evidence of disqualification for office in the New York public schools. In upholding this legislation, we expressly noted that the New York courts had construed the statute to require knowledge of organizational purpose before the regulation could apply. 342 U. S., at 494. Cf. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 413 (1950).

The oath in *Gerende* was required of candidates for public office who sought places on a Maryland ballot. On oral argument in that case, the Maryland Attorney General assured us that he would advise the proper state authorities to accept, as complying with the statute, an affidavit stating that the affiant was not engaged in an attempt to overthrow the government by force or violence or knowingly a member of an organization engaged in such an attempt. Because we read an earlier Maryland Court of Appeals' decision as interpreting the statute so that such an affidavit would satisfy its requirements, we affirmed on the basis of this assurance.

We assumed in *Garner,* that if our interpretation of the oath as containing an implicit *scienter* requirement was correct, Los Angeles would give the petitioners who had refused to sign the oath an opportunity to take it as interpreted and resume their employment. But here, with our decision in *Garner* before it, the Oklahoma Su-

preme Court refused to extend to appellants an opportunity to take the oath. In addition, a petition for rehearing which urged that failure to permit appellants to take the oath as interpreted deprived them of due process was denied. This must be viewed as a holding that knowledge is not a factor under the Oklahoma statute. We are thus brought to the question touched on in *Garner, Adler,* and *Gerende:* whether the Due Process Clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one.

But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. "They had joined, [but] did not know what it was, they were good, fine young men and women, loyal Americans, but they had been trapped into it—because one of the great weaknesses of all Americans, whether adult or youth, is to join something." [3] / At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influences which originally led to its listing.

There can be no dispute about the consequences visited upon a person excluded from public employment on dis-

[3] Testimony of J. Edgar Hoover, Hearings before House Committee on Un-American Activities on H. R. 1884 and H. R. 2122, 80th Cong., 1st Sess. 46.

loyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy." [4] Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner, Adler* and *Gerende* is decisive. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.

But appellee insists that *Adler* and *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), are contra. We are referred to our statement in *Adler* that persons seeking employment in the New York public schools have "no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell* . . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York." 342 U. S., at 492. To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in *United Public Workers,* though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal

[4] Address by Judge Learned Hand at the 86th Convocation of the University of the State of New York, delivered October 24, 1952, at Albany, New York.

office, or that no federal employee shall attend Mass or take any active part in missionary work." 330 U. S., at 100. See also *In re Summers,* 325 U. S. 561, 571 (1945). We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Because of this disposition, we do not pass on the serious questions raised as to whether the Act, in proscribing those "communist front or subversive organizations" designated as such on lists of the Attorney General of the United States, gave fair notice to those affected, in view of the fact that those listings have never included a designation of "communist fronts," and have in some cases designated organizations without classifying them. Nor need we consider the significance of the differing standards employed in the preparation of those lists and their limited evidentiary use under the Federal Loyalty Program.

Reversed.

MR. JUSTICE JACKSON, not having heard the argument, took no part in the consideration or decision of this case.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE BLACK, concurring.

I concur in all the Court says in condemnation of Oklahoma's test oath. I agree that the State Act prescribing that test oath is fatally offensive to the due process guarantee of the United States Constitution.

History indicates that individual liberty is intermittently subjected to extraordinary perils. Even countries dedicated to government by the people are not free from such cyclical dangers. The first years of our Republic marked such a period. Enforcement of the Alien and

Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today however, few individuals and organizations of power and influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion. The Oklahoma oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people. Test oaths are made still more dangerous when combined with bills of attainder which like this Oklahoma statute impose pains and penalties for past lawful associations and utterances.

Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost.

It seems self-evident that all speech criticizing government rulers and challenging current beliefs may be dangerous to the status quo. With full knowledge of this danger the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous. This means that individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest. It means that Americans discuss such questions as of right and not on sufferance of legislatures, courts or any other governmental agencies. It means that courts are without power to appraise and penalize utterances upon their notion that these utterances are dangerous. In my view this uncompromising interpretation of the Bill of Rights is the one that must prevail if its freedoms are to be saved. Tyrannical totalitarian governments cannot safely allow their people to speak with complete freedom. I believe with the Framers that our free Government can.

MR. JUSTICE DOUGLAS concurs in this opinion.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE DOUGLAS joins, concurring.

The times being what they are, it is appropriate to add a word by way of emphasis to the Court's opinion, which I join.

The case concerns the power of a State to exact from teachers in one of its colleges an oath that they are not, and for the five years immediately preceding the taking of the oath have not been, members of any organization listed by the Attorney General of the United States, prior to the passage of the statute, as "subversive" or "Communist-front." Since the affiliation which must thus be forsworn may well have been for reasons or for purposes as innocent as membership in a club of

one of the established political parties, to require such an oath, on pain of a teacher's loss of his position in case of refusal to take the oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, 50 Am. Hist. Rev. 1 (1944), reprinted in Schlesinger, Paths To The Present, 23. Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.

The Constitution of the United States does not render the United States or the States impotent to guard their governments against destruction by enemies from within. It does not preclude measures of self-protection against anticipated overt acts of violence. Solid threats to our kind of government—manifestations of purposes that reject argument and the free ballot as the means for bringing about changes and promoting progress—may be met by preventive measures before such threats reach fruition. However, in considering the constitutionality of legislation like the statute before us it is necessary to

keep steadfastly in mind what it is that is to be secured. Only thus will it be evident why the Court has found that the Oklahoma law violates those fundamental principles of liberty "which lie at the base of all our civil and political institutions" and as such are imbedded in the due process of law which no State may offend. *Hebert* v. *Louisiana,* 272 U. S. 312, 316.

That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms

of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government.

The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and National power. These functions and the essential conditions for their effective discharge have been well described by a leading educator:

> "Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must fail is that no totalitarian government is prepared to face the consequences of creating free universities.
>
> "It is important for this purpose to attract into the institution men of the greatest capacity, and to encourage them to exercise their independent judgment.
>
> "Education is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view.
>
> "The civilization which I work and which I am sure, every American is working toward, could be called a civilization of the dialogue, where instead of shooting one another when you differ, you reason things out together.
>
> "In this dialogue, then, you cannot assume that you are going to have everybody thinking the same way or feeling the same way. It would be unprogressive if that happened. The hope of eventual development would be gone. More than that, of course, it would be very boring.
>
> "A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is

to guarantee those men the freedom to think and to express themselves.

"Now, the limits on this freedom, the limits on this freedom, cannot be merely prejudice, because although our prejudices might be perfectly satisfactory, the prejudices of our successors or of those who are in a position to bring pressure to bear on the institution, might be subversive in the real sense, subverting the American doctrine of free thought and free speech." Testimony of Robert M. Hutchins, Associate Director of the Ford Foundation, November 25, 1952, in Hearings before the House Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, pursuant to H. Res. 561, 82d Cong., 2d Sess.

SCHWARTZ *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 41. Argued November 12, 1952.—Decided December 15, 1952.

Section 605 of the Federal Communications Act, which provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish" the contents thereof to any person, and which has been construed to render such intercepted communications inadmissible as evidence in federal courts, does not exclude such intercepted communications from evidence in criminal proceedings in state courts. Pp. 199–204.

— Tex. Cr. R. —, 246 S. W. 2d 174, affirmed.

Petitioner was convicted in a Texas state court as an accomplice to the crime of robbery, upon evidence obtained by wire tapping. The Court of Criminal Appeals of Texas upheld the conviction. — Tex. Cr. R. —, 246 S. W. 2d 174, rehearing denied, — Tex. Cr. R. —, 246 S. W. 2d 179. This Court granted certiorari. 343 U. S. 975. *Affirmed,* p. 204.

Maury Hughes and *Reuben M. Ginsberg* argued the cause and filed a brief for petitioner.

By special leave of Court, *Calvin B. Garwood, Jr.,* Assistant Attorney General of Texas, *pro hac vice,* and *Henry Wade* argued the cause for respondent. With them on the brief were *Price Daniel,* Attorney General, *Hugh Lyerly* and *William S. Lott,* Assistant Attorneys General, and *Ray L. Stokes.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The petitioner, Schwartz, a pawnbroker, entered into a conspiracy with Jarrett and Bennett whereby the latter two were to rob places to be designated by Schwartz and

bring the loot to him to dispose of and divide the proceeds with them. Pursuant to the plan, Jarrett and Bennett robbed a woman in Dallas, Texas, of her valuable jewels and brought the loot to the petitioner. After the petitioner repeatedly delayed settlement with the robbers, the thieves finally fell out, which proved very helpful to the police. The petitioner tipped off the police where they could find Jarrett. After Jarrett had been in jail about two weeks, he consented to telephone the petitioner from the sheriff's office. With the knowledge and consent of Jarrett, a professional operator set up an induction coil connected to a recorder amplifier which enabled the operator to overhear and simultaneously to record the telephone conversations between Jarrett and the petitioner. These records were used as evidence before the jury that tried and convicted the petitioner as an accomplice to the crime of robbery. The records, admitted only after Jarrett and the petitioner had testified, corroborated Jarrett and discredited the petitioner. The Court of Criminal Appeals of Texas upheld the conviction, — Tex. Cr. R. —, 246 S. W. 2d 174, rehearing denied, — Tex. Cr. R. —, 246 S. W. 2d 179. We granted certiorari, 343 U. S. 975.

Petitioner contends that § 605 of the Federal Communications Act [1] makes inadmissible in evidence the records of intercepted telephone conversations without the petitioner's consent. The pertinent provision of the statute reads as follows:

> ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

[1] 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*

Section 501 of 47 U. S. C. provides a penalty for the violation of § 605.

We are dealing here only with the application of a federal statute to state proceedings. Without deciding, but assuming for the purposes of this case, that the telephone communications were intercepted without being authorized by the sender within the meaning of the Act, the question we have is whether these communications are barred by the federal statute, § 605, from use as evidence in a criminal proceeding in a state court.

We think not. Although the statute contains no reference to the admissibility of evidence obtained by wire tapping, it has been construed to render inadmissible in a court of the United States communications intercepted and sought to be divulged in violation thereof, *Nardone* v. *United States,* 302 U. S. 379, and this is true even though the communications were intrastate telephone calls. *Weiss* v. *United States,* 308 U. S. 321, 329. Although the intercepted calls would be inadmissible in a federal court, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, *Wolf* v. *Colorado,* 338 U. S. 25, while such evidence, if obtained by a federal officer, would be clearly inadmissible in a federal court. *Weeks* v. *United States,* 232 U. S. 383. The problem under § 605 is somewhat different because the introduction of the intercepted communications would itself be a violation of the statute, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts. Enforcement of the statutory prohibition in § 605 can be achieved under the penal provisions of § 501.

This question has been many times before the state courts, and they have uniformly held that § 605 does not apply to exclude such communications from evidence in state courts. *Leon* v. *State,* 180 Md. 279, 23 A. 2d 706; *People* v. *Stemmer,* 298 N. Y. 728, 83 N. E. 2d 141; *Harlem Check Cashing Corp.* v. *Bell,* 296 N. Y. 15, 68 N. E. 2d 854; *People* v. *Channell,* 107 Cal. App. 2d 192, 236 P. 2d 654. While these cases are not controlling here, they are entitled to consideration because of the high standing of the courts from which they come.

Texas itself has given consideration to the admissibility of evidence obtained in violation of constitutional or statutory law and has carefully legislated concerning it. In 1925 Texas enacted a statute providing that evidence obtained in violation of the Constitution or laws of Texas or of the United States should not be admissible against the accused in a criminal case.[2] In 1929 this Article 727a of the Texas Code of Criminal Procedure was amended to provide that evidence obtained in violation of the Constitution or laws of Texas or the *Constitution* of the United States should be inadmissible in evidence,[3] thus eliminating from the coverage of the statute evidence obtained in violation of the laws of the United States.

Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to

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[2] Tex. Laws 1925, c. 49, § 1.

[3] Vernon's Tex. Stat., 1948, Code Crim. Proc., Art. 727a.

supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

> "The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." *Atchison, T. & S. F. R. Co.* v. *Railroad Commission,* 283 U. S. 380, 392–393. See *Savage* v. *Jones,* 225 U. S. 501, 533.
>
> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." *Reid* v. *Colorado,* 187 U. S. 137, 148.

It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence.

We hold that § 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so.

Since the statute is not applicable to state proceedings, we do not have to decide the questions of what amounts

to "interception," or whether if there was interception, the sender had authorized it. These questions can arise only in a federal court proceeding.

The judgment is

Affirmed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE FRANKFURTER, concurring in the result.

If the only question involved in this case were the applicability to prosecutions in State courts, in situations like the present, of § 605 of the Federal Communications Act, 47 U. S. C. § 605, as construed in the two *Nardone* cases, 302 U. S. 379; 308 U. S. 338, I would join in the opinion of the Court. I agree with the views on this subject expressed by MR. JUSTICE MINTON.

The matter is complicated, however, by a Texas statute (Art. 727a, Vernon's Code of Criminal Procedure (1948)) which renders inadmissible in criminal trials evidence obtained in violation of any provision "of the Constitution of the United States." If this limitation means, according to Texas law, that the State court is to construe what is or is not a violation under the United States Constitution, it does not raise a federal question. But if the Texas legislation means that the Texas courts are bound by what this Court deems a violation of the United States Constitution, the problem is, or might be, different. See *State Tax Commission* v. *Van Cott,* 306 U. S. 511. While, on the latter assumption, the circumstances attending the evidence that was admitted here would, in my view, render it inadmissible in a federal prosecution, see my dissent in *On Lee* v. *United States,* 343 U. S. 747, 758, the decision of this Court was to the contrary. Therefore the Texas court was in duty bound to follow that decision and to reach the result it reached even if it felt constrained, as apparently it did, to be governed

by the views of this Court as to what constitutes a violation of the United States Constitution. I cannot say that the Texas court should have followed my minority views, to which I adhere, on this constitutional question, and disregarded the Court's authority.

MR. JUSTICE DOUGLAS, dissenting.

Since, in my view (as indicated in my dissent in *On Lee* v. *United States,* 343 U. S. 747, 762), this wire tapping was a search that violated the Fourth Amendment, the evidence obtained by it should have been excluded. The question whether the Fourth Amendment is applicable to the states (see *Wolf* v. *Colorado,* 338 U. S. 25) probably need not be reached, because a Texas statute has excluded evidence obtained in violation of the Federal Constitution. Therefore I would reverse the judgment. It is true that the prior decisions of the Court point to affirmance. But those decisions reflect constructions of the Constitution which I think are erroneous. They impinge severely on the liberty of the individual and give the police the right to intrude into the privacy of any life. The practices they sanction have today acquired a momentum that is so ominous I cannot remain silent and bow to the precedents that sanction them.

FEDERAL TRADE COMMISSION *v.* MINNEAPOLIS-HONEYWELL REGULATOR CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 11. Argued October 15–16, 1952.—Decided December 22, 1952.

The Court of Appeals entered a judgment reversing the first of three parts of a cease and desist order issued by the Federal Trade Commission against respondent. After expiration of the period allowed for a petition for rehearing, the Commission filed a memorandum calling attention to the Court's failure to decree enforcement of Parts I and II; but it requested no alteration of the judgment relative to Part III. Subsequently, the Court of Appeals issued a "Final Decree" reversing Part III of the order and decreeing enforcement of Parts I and II. More than 90 days after entry of the first judgment, the Commission petitioned this Court for certiorari to review the judgment reversing Part III of its order. *Held:* The 90-day period allowed by 28 U. S. C. § 2101 (c) for filing a petition for certiorari began to run on the date of the first judgment, and the petition was not timely. Pp. 207–213.

(a) Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. Pp. 211–212.

(b) A different result is not required by the fact that the Court of Appeals labeled its second order a "Final Decree," whereas the word "Final" was missing from its first judgment. Pp. 212–213.

(c) Statutes which limit the appellate jurisdiction of this Court to cases in which review is sought within a prescribed period are not to be applied so as to permit a tolling of the time limitations because some event occurred in the lower court after judgment was rendered which is of no import on the matters to be dealt with on review. P. 213.

Writ of certiorari to review 191 F. 2d 786 dismissed.

The Court of Appeals entered a judgment reversing one of three parts of a cease and desist order of the Federal Trade Commission. 191 F. 2d 786. Later it entered

another judgment reversing that part and decreeing enforcement of the other two parts of the order. On petition of the Federal Trade Commission, this Court granted certiorari to review the judgment reversing part of its order, and requested counsel to discuss the "timeliness of the application for the writ." 342 U. S. 940. *Writ dismissed,* p. 213.

Acting Solicitor General Stern argued the cause for petitioner. With him on the brief were *Acting Assistant Attorney General Clapp, Daniel M. Friedman, W. T. Kelley* and *Robert B. Dawkins.*

Albert R. Connelly argued the cause for respondent. With him on the brief was *Will Freeman.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

The initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period allowed by law.[1] We hold that it was not.

The cause grows out of a proceeding initiated by petitioner, the Federal Trade Commission, in 1943. At that time, the Commission issued a three-count complaint against respondent. Count I charged a violation of § 5 of the Federal Trade Commission Act; [2] Count II charged a violation of § 3 of the Clayton Act; [3] Count III dealt with an alleged violation of § 2 (a) of the Clayton Act as amended by the Robinson-Patman Act.[4] A protracted administrative proceeding followed. The Commission finally determined against respondent on all three counts,

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[1] 28 U. S. C. § 2101 (c).

[2] 38 Stat. 719, 15 U. S. C. § 45.

[3] 38 Stat. 731, 15 U. S. C. § 14.

[4] 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13 (a).

and it issued a cease and desist order, in three parts, covering each of the three violations.

Respondent petitioned the Court of Appeals for the Seventh Circuit to review and set aside this order. The Commission sought enforcement of all parts of its order in a cross-petition.

Respondent abandoned completely its attack on Parts I and II of the order. In briefs and in oral argument, respondent made it clear that the legality of Part III was the only contested issue before the Court of Appeals. Neither party briefed or argued any question arising out of Parts I and II.

On July 5, 1951, the Court of Appeals announced its decision. The opinion stated that since respondent did not "challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them." The court then went on to hold that Part III of petitioner's order could not be sustained by substantial evidence and should be reversed. 191 F. 2d 786. On the same day, the court entered its judgment, the pertinent portion reading as follows:

> ". . . it is ordered and adjudged by this Court that Part III of the decision of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the complaint upon which it is based be, and the same is hereby Dismissed."

The Court of Appeals requires petitions for rehearing to be filed "within 15 days after entry of judgment." The Commission filed no such petition. On August 21, 1951, long after the expiration of this 15-day period, and after a certified copy of said judgment, in lieu of mandate, was issued, the Commission filed a memorandum with the court which reads in part as follows:

"On July 5, 1951 the Court entered its opinion and judgment reversing Part III of the decision of the Federal Trade Commission dated January 14, 1948 and dismissing Count III of the complaint upon which it is based. No disposition has been made of the Cross-Petition filed by the Commission for affirmance and enforcement of the entire decision. The Commission takes the position that its Cross-Petition should be in part sustained, i. e., to the extent that the Court should make and enter herein a decree affirming Parts I and II of the Commission's order to cease and desist and commanding Minneapolis-Honeywell Regulator Company to obey the same and comply therewith. . . .

. . . . . .

"11. In its briefs filed herein the petitioner abandoned its attack upon Parts I and II of the order and challenged only the validity of Part III of the order (see page 1 of petitioner's brief dated March 15, 1951). Thus, petitioner concedes the validity of Parts I and II of the order and does not contest the prayer of the Commission's Cross-Petition and brief with respect to the affirmance and enforcement of Parts I and II of the order."

Clearly, by this memorandum the Commission sought no alteration of the judgment relative to Part III; in fact, it acknowledged the entry of judgment reversing Part III on July 5, 1951. It did not even claim it to be a petition for rehearing. It was submitted that Parts I and II of the order were uncontested, and "In conclusion . . . submitted that the Court should make and enter . . . a decree affirming and enforcing Parts I and II of the Commission's order to cease and desist."

On September 18, 1951, the Court of Appeals issued what it called its "Final Decree." Again the court

"ordered, adjudged and decreed" that Part III of the Commission's order "is hereby reversed and Count III of the complaint upon which it is based be and the same is hereby dismissed." The court then went on to affirm Parts I and II, and it entered a judgment providing for their enforcement, after reciting again that there was no contest over this phase of the order.

On December 14, 1951, the Commission filed its petition for certiorari. Obviously, the petition was out of time unless the ninety-day filing period began to run anew from the second judgment entered on September 18, 1951. In our order granting certiorari, 342 U. S. 940, we asked counsel to discuss the "timeliness of the application for the writ."

Petitioner refers us to cases which have held that when a court considers on its merits an untimely petition for a rehearing, or an untimely motion to amend matters of substance in a judgment, the time for appeal may begin to run anew from the date on which the court disposed of the untimely application.[5]

Petitioner apparently would equate its memorandum of August 21, 1951, with an untimely petition for a rehearing affecting Part III. But certainly its language and every inference therein is to the contrary. When petitioner filed its memorandum, the time for seeking a rehearing had long since expired.

Moreover, the memorandum was labeled neither as a petition for a rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief. On the contrary, the Commission indicated that it was quite content to let the Court of Appeals' decision of July 5 stand undisturbed. Since we cannot

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[5] *Pfister* v. *Finance Corp.*, 317 U. S. 144, 149 (1942); *Bowman* v. *Loperena*, 311 U. S. 262, 266 (1940); *Wayne United Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 137–138 (1937).

treat the memorandum of August 21 as petitioner would have us treat it, we cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari.

Petitioner tells us that the application must be deemed to be in time because "when a court actually changes its judgment, the time to appeal or petition begins to run anew irrespective of whether a petition for rehearing has been filed." [6] We think petitioner's interpretation of our decisions is too liberal.

While it may be true that the Court of Appeals had the power to supersede the judgment of July 5 with a new one,[7] it is also true, as that court itself has recognized, that the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged.[8] Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought.[9] Only when the lower court changes matters of substance,[10] or resolves a genuine ambiguity,[11] in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run

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[6] Brief for petitioner, p. 43.

[7] 28 U. S. C. § 452; see *Zimmern* v. *United States,* 298 U. S. 167 (1936).

[8] See *Fine* v. *Paramount Pictures,* 181 F. 2d 300, 304 (1950).

[9] *Department of Banking* v. *Pink,* 317 U. S. 264 (1942); *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399 (1923); *Credit Co., Ltd.* v. *Arkansas Central R. Co.,* 128 U. S. 258 (1888).

[10] See *Zimmern* v. *United States,* 298 U. S. 167, 169 (1936); compare *Department of Banking* v. *Pink, supra.*

[11] Compare *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17 (1952).

anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.[12]

The judgment of September 18, which petitioner now seeks to have us review, does not meet this test. It reiterated, without change, everything which had been decided on July 5. Since the one controversy between the parties related only to the matters which had been adjudicated on July 5, we cannot ascribe any significance, as far as timeliness is concerned, to the later judgment.[13]

Petitioner puts great emphasis on the fact that the judgment of September 18 was labeled a "Final Decree" by the Court of Appeals, whereas the word "Final" was missing from the judgment entered on July 5. But we think the question of whether the time for petitioning for certiorari was to be enlarged cannot turn on the adjective which the court below chose to use in the caption of its second judgment. Indeed, the judgment of July 5

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[12] Compare *Rubber Co.* v. *Goodyear*, 6 Wall. 153 (1868) (appeal allowed from a second decree, restating most provisions of the first because the first decree, at the time of entry, was only regarded by the parties and the court as tentative); *Memphis* v. *Brown*, 94 U. S. 715 (1877) (appeal allowed from second judgment on the ground that the second made material changes in the first). See *United States* v. *Hark*, 320 U. S. 531, 533–534 (1944); *Hill* v. *Hawes*, 320 U. S. 520, 523 (1944).

[13] The suggestion is made that the September 18 judgment injected a new controversy into the litigation—the question of whether the Court of Appeals had the power to affirm and enforce the Commission's order after it had cross-petitioned for such relief. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470 (1952). But if the respondent had sought to contest that issue, it could have done so from the start, by raising objections to enforcement of all parts of the Commission's cross-petition. Instead, respondent refused to contest these parts of the Commission's order. Having done so, it removed the question involved in the *Ruberoid* case from this case.

was for all purposes final. It put to rest the questions which the parties had litigated in the Court of Appeals. It was neither "tentative, informal nor incomplete." [14] Consequently, we cannot accept the Commission's view that a decision against it on the time question will constitute an invitation to other litigants to seek piecemeal review in this Court in the future.

Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end.[15] It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review.

Accordingly, the writ of certiorari is

Dismissed.

MR. JUSTICE BLACK, dissenting.

The end result of what the Court does today is to leave standing a Court of Appeals decree which I think is so clearly wrong that it could well be reversed without argument. The decree set aside an order of the Federal Trade Commission directing Minneapolis-Honeywell to stop violating § 2 (a) of the Robinson-Patman Act by selling oil burner controls to some customers cheaper than to others. The Court of Appeals not only set aside the Commission's order as permitted under some circumstances. It went much further and ordered the Commis-

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[14] See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 514 (1950).

[15] See *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415 (1943).

sion to dismiss Count III of the complaint against Minneapolis-Honeywell. In doing so the Court of Appeals invaded an area which Congress has made the exclusive concern of the Federal Trade Commission. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55; *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145–146.

Moreover, the Court of Appeals held that there was no evidence at all to substantiate the Commission finding that a quantity discount pricing system of Minneapolis-Honeywell resulted in price discriminations that violated § 2 (a) of the Robinson-Patman Act. But there was evidence before the Commission that some customers of Minneapolis-Honeywell were given substantially bigger discounts on purchases than those given their competitors. And the Commission found that these variations were not justified by any differences in costs of manufacture, sale or delivery. We have emphasized that such a showing amply supports a Commission cease and desist order. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 47. The Court of Appeals here failed to follow our holding in the *Morton Salt* case. For this reason also it should be reversed.

I think the following facts show that the petition for certiorari here was filed in time. The Court of Appeals was petitioned by Minneapolis-Honeywell to review and set aside a Trade Commission order in its entirety. Later Minneapolis-Honeywell apparently conceded validity of part of the order and the court's first decree of July 5, 1951, failed to pass on all the provisions of the Commission's order.[1] The Commission had ninety days to ask

[1] See, *e. g.*, "Though the merits of the cause may have been substantially decided, while any thing, though merely formal, remains to be done, this Court cannot pass upon the subject. If from any

that we review that partial order if it was a "final" one. Within that ninety days, on August 21, 1951, the Commission asked the Court of Appeals to pass on the remainder of the order. In response a new and expanded decree of the Court of Appeals came down September 18, 1951, marked "Final Decree." December 14, 1951, within ninety days after rendition of this "Final Decree," the Commission filed here its petition for certiorari which the Court now dismisses.

I think that no statute, precedent or reason relied on by the Court requires dismissal of this cause. Of course appealability of a judgment depends on its being "final" in the legalistic sense. But there is no more ambiguous word in all the legal lexicon.[2] The Court of Appeals thought its second not its first decree was "final." Counsel for the Commission evidently believed the second judgment was the "final" one. I am confident many lawyers would have thought the same under this Court's former cases. So I would have viewed the second judgment before today's holding. Former cases would have

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intermediate stage in the proceedings an appeal might be taken to the Supreme Court, the appeal might be repeated to the great oppression of the parties." Mr. Chief Justice Marshall speaking for the Court in *Life & Fire Ins. Co. of New York* v. *Adams,* 9 Pet. 573, 602 (1835). "We think that the decree is not a final decree, and that this court has no jurisdiction of the appeal. The decree is not final, because it does not dispose of the entire controversy between the parties." *Keystone Iron Co.* v. *Martin,* 132 U. S. 91, 93 (1889). "It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. . . . The cause is not to be sent up in fragments." *Holcombe* v. *McKusick,* 20 How. 552, 554 (1858).

[2] "Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." *McGourkey* v. *Toledo & Ohio R. Co.,* 146 U. S. 536, 544–545. Cf. *Dickinson* v. *Petroleum Conversion Corp.,* 338 U. S. 507, 511.

pointed strongly to rejection of appeal from the incomplete first decree as an attempted "piecemeal" review.[3]

The majority advances logical and rational grounds for its conclusion that the first judgment rather than the second one was "final." That the second judgment was "final," legalistically speaking, is equally supportable by logic, reason and precedent, if not more so.[4] But in arguing over "finality" we should not ignore the fact that Congress has declared that this type of proceeding should be reviewable both in the Court of Appeals and here. We frustrate that declaration when review is denied a

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[3] A multitude of cases would have supported such a belief on the part of Commission counsel. See, *e. g.*, Note 1 and the following: "But piecemeal appeals have never been encouraged." *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 258. "Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick* v. *United States*, 309 U. S. 323, 325. "The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments. . . .' *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341." *Catlin* v. *United States*, 324 U. S. 229, 233–234.

[4] "Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.

"We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree." *Rubber Company* v. *Goodyear*, 6 Wall. 153, 155–156 (1868). See also *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20–21; *Hill* v. *Hawes*, 320 U. S. 520; *United States* v. *Hark*, 320 U. S. 531; *Zimmern* v. *United States*, 298 U. S. 167; *Memphis* v. *Brown*, 94 U. S. 715.

litigant because of his failure to guess right when confronted in August 1951 with a puzzle, the answer to which no one could know until today.

In prior cases cited in the Court's opinion this Court has found ways to grant review to litigants bedeviled and confused by the judicially created fog of "finality." [5] In those prior cases the Court recognized the vagueness of the finality rule and refused to throw out of court litigants who had acted bona fide. It is unfortunate that the Court today fails to utilize this same kind of judicial ingenuity to afford this litigant the review Congress saw fit to provide in the public interest.

The proceedings against Minneapolis-Honeywell began before the Commission nine years ago. Sixteen hundred pages of evidence were put on the record. It all goes to nought apparently because Commission counsel lacked sufficient clairvoyance to anticipate that this Court would hold that the July judgment rather than the one in September was final. Rules of practice and procedure should be used to promote the ends of justice, not to defeat them.[6]

MR. JUSTICE DOUGLAS, dissenting.

While I do not believe the merits of the case are as clear as MR. JUSTICE BLACK indicates, I join in the parts of his opinion which deal with the question whether the petition for certiorari was timely under 28 U. S. C. § 2101 (c).

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[5] See cases cited in Note 4.

[6] *Hormel* v. *Helvering,* 312 U. S. 552, 557. See also *Maty* v. *Grasselli Chemical Co.,* 303 U. S. 197, 200–201. Cf. *Hazel-Atlas Co.* v. *Hartford-Empire Co.,* 322 U. S. 238.

UNITED STATES *v.* UNIVERSAL C. I. T. CREDIT CORPORATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 47. Argued November 18–19, 1952.—Decided December 22, 1952.

1. In an information under §§ 15 and 16 (a) of the Fair Labor Standards Act, appellees were charged on 32 counts with violating the minimum wage, overtime and record-keeping provisions of the Act. The District Court dismissed all but three counts, one for each section violated. *Held:* The order of the District Court is affirmed without prejudice to amendment of the information. Pp. 218–226.
2. Section 15 of the Fair Labor Standards Act penalizes a course of conduct and is not to be read as enabling the prosecutor to treat as a separate offense each breach of the statutory duty owed to a single employee during any workweek. Pp. 221–226.

102 F. Supp. 179, affirmed.

The District Court dismissed all but three counts of a 32-count information under §§ 15 and 16 (a) of the Fair Labor Standards Act. 102 F. Supp. 179. On appeal to this Court, under 18 U. S. C. § 3731, *affirmed*, p. 226.

John F. Davis argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg, J. F. Bishop, William S. Tyson* and *Bessie Margolin. Philip B. Perlman,* then Solicitor General, was on the Statement as to Jurisdiction.

Melbourne Bergerman argued the cause for appellees. With him on the brief were *Aaron Lewittes, Seymour Kleinman* and *James P. Aylward.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case arises on an information under §§ 15 and 16 (a) of the Fair Labor Standards Act, 52 Stat. 1060,

1068–1069, as amended, 63 Stat. 910, 919, 29 U. S. C. §§ 215, 216 (a), charging the defendant corporation, its division operations manager and two successive branch managers with violations of the minimum wage, overtime, and record-keeping provisions of the Act.[1] Thirty-two counts were laid: six for failure under § 6 of the Act to pay minimum wages, twenty for violation of the overtime provisions of § 7, and six for failure to comply with the requirements for record-keeping under § 11. Counts 1–6 charge minimum wage violations in six separate weeks, one per week, but only as to one employee in any one week and only as to three employees in all. Counts 7–26 charge overtime violations in twenty separate weeks, one per week. A total of eleven employees are involved, two violations having been charged as to each of nine employees. Counts 27–32 charge record-keeping violations as to four employees, two violations as to each of two employees

[1] The criminal enforcement provisions of the Fair Labor Standards Act are §§ 15 and 16. Section 16 provides a maximum fine of $10,000 for "[a]ny person who willfully violates any of the provisions of section 15 . . . ." Section 15 makes it "unlawful for any person . . . (2) to violate any of the provisions of section 6 or section 7 . . . (5) to violate any of the provisions of section 11 (c) . . . ." Section 6 provides, "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce . . . not less than 75 cents an hour; . . . ." Section 7 provides ". . . no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Section 11 (c) requires the employer to "make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order . . . ."

being charged. Section 16 of the Act subjects an employer, offending for the first time, to a maximum fine of $10,000 for violation of any provision of § 15, and would, the District Court assumed, authorize a fine of $320,000 upon conviction under this information.[2]

Rejecting a reading of § 15 whereby the prosecutor could treat as a separate offense each breach of the statutory duty owed to a single employee during any single workweek,[3] the District Court granted defendant's motion to dismiss all but three counts of the information. The court held that it is a course of conduct rather than the separate items in such course that constitutes the punishable offense and ordered consolidation of the separate acts set forth in the information into three counts, charg-

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[2] 102 F. Supp. 179, 186, modified by Order dated March 10, 1952, R. 20.

[3] The Government urges that the Act be construed "to punish each failure to comply with each duty imposed by the Act as to each employee in each workweek and as to each record required to be kept." Brief for United States, p. 10. However, in none of the first 26 counts, charging minimum wage or overtime underpayments, were similar violations charged as to two employees in the same week, so that it would be sufficient in this case to urge that the violations may be split according to the workweek, rather than also according to the employee. As to the last six counts, charging record-keeping violations, it might have been possible for the Government to urge less than that each record required to be kept is a separate offense. With one minor exception, violations were alleged as to at least two employees in every workweek for which record-keeping violations were charged. The workweek was not the unit of prosecution, since the periods of time in these six counts range from about seven weeks to over six months. But the employee was also not the unit, since although violations as to each employee were made into separate charges, two employees are the subject of two charges apiece.

Whatever differences exist between the minimum necessary to sustain this particular information and the claim made by the Government are immaterial, in view of our disposition of the case.

ing one violation each of §§ 6, 7 and 11.[4] To review this decision, the Government brought the case here under the Criminal Appeals Act, 34 Stat. 1246, 18 U. S. C. § 3731.

The problem of construction of the criminal provisions of the Fair Labor Standards Act is not easy of solution. What Congress has made the allowable unit of prosecution—the only issue before us—cannot be answered merely by a literal reading of the penalizing sections. Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique. See *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 402. For that reason we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress. Very early Mr. Chief Justice Marshall told us, "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." *United States* v. *Fisher,* 2 Cranch 358, 386. Particularly is this so when we construe statutes defining conduct which entail stigma and penalties and prison. Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress

[4] Appellee does not urge in this case that § 15 prescribes only one offense even if there are three kinds of violations. Such an argument seems to have been made and was rejected, as to distinct requirements under two different sections of the act there involved, in *Blockburger* v. *United States,* 284 U. S. 299, 305, where the penal provision applied to "any person who violates or fails to comply with any of the requirements of this act."

has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

The penal provision of the Fair Labor Standards Act is only part of a scheme available to the Government and to the employee for enforcing the Act. The preventive remedy of an injunction and individual or class actions for restitution and damages in § 16 (b) are not only also available. They are the remedies more frequently invoked and more effective in achieving the purposes of the Act. Of course the various remedies must be read in relation to each other. But we are asked here in addition to infer that an employer's failure to perform his obligations as to each employee creates a separate criminal offense because the provisions for civil liability in § 16 (b) expressly recognize a right in the individual employee to maintain a separate action against his employer for restitution and damages. The argument cuts both ways. If Congress had wanted to attach criminal consequences to each separate civil liability it could easily have said so, just as it had no difficulty in stating explicitly that the unit for civil liability was what was owing to each employee. Instead of balancing the various generalized axioms of experience in construing legislation, regard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning.

When originally introduced in Congress, the bill out of which the Fair Labor Standards Act evolved had two separate penalty provisions, one for underpayments in violation of § 6 or § 7 and one for failure to comply with the record-keeping provisions of § 11.[5] Each provision

[5] See §§ 27 (a) and 27 (b) in S. 2475 and H. R. 7200, 75th Cong., 1st Sess.

set the maximum fine at $500 and explicitly defined what constituted a separate offense. As to §§ 6 and 7 the employee was the unit of criminal offense and as to § 11 each week of violation was a separate offense.[6] After the measure wound its way through a long legislative process there resulted consolidation of the two penalty provisions, elimination of the separate offense clauses, and substitution of $10,000 for $500 as the maximum fine. These rather striking changes would in themselves afford justifiable ground for giving the less harsh and therefore more reasonable construction to the offense-creating portions of the legislation. In addition, we have illuminating statements in both houses concerning the separation of offenses. Although the separate offense clause for record-keeping violations was deleted early in the legislative process, the other separate offense clause was attacked in debate precisely because it would authorize the sort of multiplication of offenses by the number of employees that the information before us represents.[7] Indeed, multiplication in this information goes beyond what even the original bills would have authorized. Un-

[6] In § 27 (a), the clause read: "Where the employment of an employee in violation of any provision of this Act or of a labor-standard order is unlawful, each employee so employed in violation of such provision shall constitute a separate offense." In § 27 (b), the clause was: ". . . and each week of such failure to keep the records required under this Act or to furnish same to the Board or any authorized representative of the Board shall constitute a separate offense."

[7] See 81 Cong. Rec. 7792; 81 Cong. Rec. 9507; 82 Cong. Rec. 1828. Force is added to these statements by the fact that one was made by a member of the House who proposed the amendment which was adopted, by vote on division, specifically to delete the separate offense clause of § 27 (a) (then § 22 (a)). 82 Cong. Rec. 1828–1839. The bill thus came to the Conference from the House with both separate offense clauses deleted, but from the Senate with only the clause of § 27 (b) deleted. Both versions still provided a maximum fine of $500. The Conference accepted the House version, with neither

derpayments of the same employees are split into separate counts of the information, and record-keeping violations during the same week are split to serve as the basis of separate counts.

It would be self-deceptive to claim that only one answer is possible to our problem. But the history of this legislation and the inexplicitness of its language weigh against the Government's construction of a statute that cannot be said to be decisively clear on its face one way or the other. Because of the history and language of this legislation, the case is not attracted by the respective authority of two cases pressed upon us. *In re Snow,* 120 U. S. 274, and *Blockburger* v. *United States,* 284 U. S. 299.

The district judge was therefore correct in rejecting the Government's construction of the statute. The offense made punishable under the Fair Labor Standards Act is a course of conduct. Such a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single "impulse," a conception recognized by this Court in the *Blockburger* case, *supra,* at 302, quoting Wharton's Criminal Law (11th ed.) § 34. Merely to illustrate, without attempting to rule on specific situations: a wholly unjustifiable managerial decision that a certain activity was not work and therefore did not require compensation under F. L. S. A. standards cannot be turned into a multiplicity of offenses by considering each underpayment in a single week or to a single employee as a separate offense.

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separate offense clause, but raised the maximum fine to $10,000. See S. 2475, 75th Cong., 1st Sess., §§ 23 (a), 23 (b), as reported from Committee, July 8, 1937; 81 Cong. Rec. 7957; H. R. Rep. No. 2182, 75th Cong., 3d Sess. 5; 83 Cong. Rec. 7450; Conference Report, § 16 (a), 83 Cong. Rec. 9249.

However, a wholly distinct managerial decision that piece workers should be paid less than the statutory requirement in terms of hourly rates, see *United States* v. *Rosenwasser,* 323 U. S. 360, involves a different course of conduct, and so would constitute a different offense. Thus, underpayments based on violations of the statute as to these piece workers could not be compounded into a single offense with unrelated underpayments which resulted from the decision that a certain activity was not work, merely because the two kinds of underpayments occurred in the same workweek or involved the same employee. Whether an aggregate of acts constitute a single course of conduct and therefore a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts.

This information is based on what we find to be an improper theory. But a draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or, by asking for a bill of particulars, to render the various counts more specific. In any event, by an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense.

By affirming this order without prejudice to amendment of the information, we do not mean to suggest that amendment to increase the number of offenses may be made after trial has begun. But the Government is not precluded from now amending the information either to meet the exigencies of the evidence or to charge as sep-

arate offenses separate courses of conduct as to each substantive provision. All we now decide is that the district judge correctly held that a single course of conduct does not constitute more than one offense under § 15 of the Fair Labor Standards Act.

Without prejudice to amendment of the information before trial if the evidence to be offered warrants it, the order below is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

I think the question whether an employer has violated the criminal provisions of the Act is determined by reference to what he has done to a particular employee. The Act does not speak of "course of conduct." That is the Court's terminology, not the Act's. The Act requires the employer to pay "each of his employees" not less than 75 cents an hour, prohibits him from employing "any of his employees" for more than 40 hours a week unless overtime is paid, and requires him to keep records of "the persons employed by him" and the wages, hours, etc. 29 U. S. C. §§ 206, 207, 211 (c), as amended. And the Act makes it unlawful for an employer to violate "any of the provisions" of those sections. 29 U. S. C. §§ 215, 216 (a).

It therefore seems clear to me that if an employer pays one employee less than 75 cents an hour *or* fails to pay overtime to one employee, *or* fails to keep the required records for one employee, a crime has been established, if *scienter* is shown. And it seems equally clear to me that if an employer wilfully fails to pay one employee the minimum wage, *and* wilfully fails to pay him the required overtime, *and* wilfully fails to keep the required records for him, three crimes have been committed. The crime is defined with reference to the individual employee. The crime may be a single, isolated act. It may or may not

be recurring or continuous. The violation may affect one employee one week or one month and another employee another week or another month; and it may affect one employee in one way, another employee in a different way. The violations may be continuous, and follow a set pattern; or they may be sporadic and erratic. The Act does not differentiate between them. Nothing is said about "course of conduct." Perhaps a committee of Congress would be receptive to the suggestion now made. But it should be received there, not here. Of course, horrendous possibilities can be envisaged under almost every law. But the prosecutors who enforce this Act, the grand juries who hear the evidence on violations, and the District Courts who apply the sanctions have to date not made these criminal provisions oppressive and beyond reason. Yet until this case no court, so far as I can learn, has ever had the inventive genius to suggest that "course of conduct" rather than the "employee" is the unit of the crime.

F. W. WOOLWORTH CO. *v.* CONTEMPORARY ARTS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 42. Argued November 17, 1952.—Decided December 22, 1952.

Respondent sued petitioner under the Copyright Act to recover for infringement of copyright on a statuette, infringing copies of which had been sold by petitioner in its stores. Petitioner proved that its gross profit from the infringement was $899.16. The evidence of damage suffered by respondent, though indicating real and substantial injury, was insufficient to establish the amount of damage actually sustained. The trial court allowed recovery of $5,000 "statutory damages." *Held:* The award of damages in the amount of $5,000 was authorized by 17 U. S. C. § 101 (b). Pp. 229–234.

(a) The fact that petitioner proved that its gross profit from the infringement was $899.16 does not limit recovery to that amount. Pp. 231–233.

(b) *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, and *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202, distinguished. P. 234.

(c) The statute empowers the trial court in the exercise of a sound judicial discretion to determine whether on all the facts a recovery upon proven profits and damages or one estimated within the statutory limits is more just; and there was no abuse of that discretion in this case. P. 234.

193 F. 2d 162, affirmed.

In an action under the Copyright Act to recover for infringement of copyright, the District Court gave judgment for the plaintiff, respondent here. The Court of Appeals affirmed. 193 F. 2d 162. This Court granted a limited writ of certiorari. 343 U. S. 963. *Affirmed,* p. 234.

Kenneth W. Greenawalt argued the cause for petitioner. With him on the brief were *Martin A. Schenck* and *John H. Barber.*

Cedric W. Porter argued the cause for respondent. With him on the brief was *Harry F. R. Dolan.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Respondent brought this action under the Copyright Act to recover for infringement of copyright on a work of art entitled "Cocker Spaniel in Show Position." The District Court found the copyright, of which respondent was assignee, valid and infringed and awarded statutory damages of $5,000, with a $2,000 attorney's fee. The Court of Appeals affirmed.[1] We granted certiorari,[2] limiting the issues to the measure of the recovery, as to which conflict appears among lower courts.[3]

Respondent made small sculptures and figurines, among which were statues of the cocker spaniel, and marketed them chiefly through gift and art shops. Petitioner, from a different source, bought 127 dozen cocker spaniel statuettes and distributed them through thirty-four Woolworth stores. Unbeknown to Woolworth, these dogs had been copied from respondent's and by marketing them it became an infringer.

By the Act an infringer becomes liable—

> "To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he

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[1] 193 F. 2d 162.

[2] 343 U. S. 963.

[3] *F. W. Woolworth Co.* v. *Contemporary Arts,* 193 F. 2d 162, 167–169; *Sammons* v. *Colonial Press,* 126 F. 2d 341, 350; *Davilla* v. *Brunswick-Balke Collender Co.,* 94 F. 2d 567; *Malsed* v. *Marshall Field & Co.,* 96 F. Supp. 372, 376–377.

> claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . ." 17 U. S. C. § 101 (b).

Profits made by the petitioner from the infringement were sufficiently proved to enable assessment of that element of liability. Petitioner itself showed, without contradiction, that the 127 dozen dogs were bought at 60 cents apiece and sold for $1.19 each, yielding a gross profit of $899.16. The infringer did not assume the burden, which the statute casts upon it, of proving any other costs that might be deductible, so the gross figure is left to stand as the profit factor of the infringer's total liability.

As to the other ingredient in computing liability, damages suffered by the copyright proprietor, the record is inadequate to establish an actually sustained amount. Enough appears to indicate that real and substantial injury was inflicted. Respondent had gross annual income of about $35,000 and engaged only eight employees, indicating its small production. Its statuettes were of three media and prices: red plaster retailed at $4, red porcelain at $9, while a black and white porcelain brought $15. There was evidence that the cheaper infringing statuette was inferior in quality. Respondent proved loss of some customers and offered, but was not allowed, to show complaints from sales outlets about the Woolworth competition, decline in respondent's sales, and eventual abandonment of the line with an unsalable stock on hand. The trial judge excluded or struck most of this testimony on the ground that authority to allow statutory damages rendered proof of actual damage unnecessary. It might have been better practice to have received the evidence,

even if it fell short of establishing the measure of liability; for when recovery may be awarded without any proof of injury, it cannot hurt and may aid the exercise of discretion to hear any evidence on the subject that has probative value. However, petitioner cannot complain of this exclusion, which was in response to its objections. At length, the court said: "If you establish this was an infringement of copyright, it is inescapably clear there is enough evidence in this case upon which to predicate damage up to $5000. I don't think Mr. Barnes [counsel for defendant] disagrees with that, do you?" Mr. Barnes: "No, your Honor."

The court, having found infringement, accordingly allowed recovery of "statutory damages in the amount of Five Thousand Dollars ($5,000.) as provided by the Copyright Laws of the United States," with an injunction and attorney's fee.

Petitioner's contention here is that the statute was misapplied because its own gross profit of $899.16 supplied an actual figure which became the exclusive measure of its liability. It argues that an infringing defendant, by coming forward with an undisputed admission of its own profit from the infringement, can tie the hands of the court and limit recovery to that amount. We cannot agree.

In *Douglas* v. *Cunningham*, 294 U. S. 207, 209, we said:

> "The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits."

To fulfill that purpose, the statute has been interpreted to vest in the trial court broad discretion to determine whether it is more just to allow a recovery based on cal-

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culation of actual damages and profits, as found from evidence, or one based on a necessarily somewhat arbitrary estimate within the limits permitted by the Act.

> "In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them." *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106–107.

Few bodies of law would be more difficult to reduce to a short and simple formula than that which determines the measure of damage recoverable for actionable wrongs. The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute. It is plain that the court's choice between a computed measure of damage and that imputed by statute cannot be controlled by the infringer's admission of his profits which might be greatly exceeded by the damage inflicted. Indeed sales at a small margin might cause more damage to the copyright proprietor than sales of the infringing article at a higher price.

Whether discretionary resort to estimation of statutory damages is just should be determined by taking into account both components and the difficulties in the way of proof of either. In this case the profits realized were established by uncontradicted evidence, but the court was

within the bounds of its discretion in concluding that the amount of damages suffered was not computable from the testimony. Lack of adequate proof on either element would warrant resort to the statute in the discretion of the court, subject always to the statutory limitations.

The case before us illustrates what capricious results would follow from the practice for which petitioner contends. It has admitted gross profits, which make no deduction for sales costs, overheads or taxes and, hence, may appear substantial on this particular record. But gross profits is not what a copyright owner is entitled to recover, but only such profits as remain after the defendant reduces them, as it may, by proof of allowable elements of cost. If we sustain petitioner's contention that profits may be the sole measure of liability as matter of law, such profits could be diminished even to the vanishing point.

Net profits realized by a far-flung distributing enterprise like Woolworth's upon sales of a given item in a few of its many stores can be calculated only by a process of allocating overheads, sales expenses, taxes, and a host of items. A plaintiff in the position of the present one could hardly verify or contest such apportionments unless it should audit the whole Woolworth business.

Moreover, a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.

Petitioner cites *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 399, where this Court said that the "in lieu" clause "is not applicable here, as the profits have been proved and the only question is as to their apportionment," a statement on which petitioner leans almost its whole weight. There net profits from exhibition of an infringing picture were found to be $587,604.37. The copyright owner could show no such value to himself of his copyright; indeed, he had negotiated its sale at $30,000. The Court of Appeals cut the award of these actual profits to one-fifth thereof, upon the ground that success of the picture had been largely due to factors not contributed by the infringement. The propriety of this reduction was the sole issue before this Court. Petitioner copyright owner asserted that in such circumstances the "in lieu" clause "is not involved here." This Court agreed that under those facts resort to the statute was not appropriate. That case did not present the question now here. Nor does anything in *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202, in the light of its facts, support petitioner. It holds use of the "in lieu" clause permissible, "there being no proof of actual damages," but it does not hold that partial or unacceptable proof on that subject will preclude resort to the "in lieu" clause.

We think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon proven profits and damages or one estimated within the statutory limits is more just. We find no abuse of that discretion.

The judgment below is

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE FRANKFURTER concurs, dissenting.

The earthenware dogs found to infringe respondent's copyright were bought by F. W. Woolworth Company in

good faith at a total cost of $914.40. Woolworth's total profit from the sale of the dogs was $899.16. The Court now holds that Woolworth must pay the dogs' copyright owner $5,000. This award is said to be allowed by § 101 (b) of the Copyright Act, 17 U. S. C. § 101. We do not think that section authorizes any such manifestly unjust exaction. This Court pointed out in *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 400–401, that § 101, like an analogous patent law section, was not intended to award a copyright owner both damages and profits, but only "one or the other, whichever was the greater." Under this rule, profits only should be awarded to respondent in this case.

Reliance for awarding $5,000 against Woolworth is naturally placed on that provision of § 101 (b) which provides for damages not in excess of $5,000 "in lieu of actual damages and profits." But this Court has said that the purpose of this section was to recompense for injury done "where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas* v. *Cunningham,* 294 U. S. 207, 209. Here proof of profits was neither difficult nor impossible. And in the carefully considered case of *Sheldon* v. *Metro-Goldwyn Pictures Corp., supra,* at 399, Mr. Chief Justice Hughes speaking for the Court declared, ". . . the 'in lieu' clause is not applicable here, as the profits have been proved . . . ." See also to the same effect *Davilla* v. *Brunswick-Balke Collender Co.,* 94 F. 2d 567; *Sammons* v. *Colonial Press,* 126 F. 2d 341. We would adhere to this view and limit this recovery to profits made by Woolworth. This Court should heed the admonition given in the *Sheldon* case to remember that the object of § 101 (b) is not to inflict punishment but to award an injured copyright owner that which in fairness is his "and nothing beyond this." *Sheldon* v. *Metro-Goldwyn Pictures Corp., supra,* at 399.

The following circumstances bear on the question of unfairness of the amount of damages awarded. Petitioner contended in the Court of Appeals that the district judge did not give it a fair and impartial trial. "In support of this contention," the Court of Appeals said, "the appellant points to several instances in the record of irrelevant and prejudicial comments and remarks" made by the trial judge. Considering the judge's remarks as "both unseemly and uncalled for," the Court of Appeals said:

> "But after careful consideration of the record as a whole we have concluded that the particular remarks of the judge which would better have been left unsaid, and are better not quoted, do not rise to the seriousness of reversible error. Having regard for the convincing nature of the plaintiff's proof, and the unconvincing nature of that of the defendant, we do not feel that the decision reached by the court below can be attributed to bias and prejudice. That is to say, we feel that the defendant really had a fair and impartial trial." 193 F. 2d 162, 169.

We accept the Court of Appeals' appraisal of the consequences of the judge's remarks on the factual issue of copyright infringement. But here the trial judge gave judgment for statutory damages in an amount that smacks of punitive qualities. And this Court has held that the amount of such damages is committed to the unreviewable discretion of a trial judge. *Douglas* v. *Cunningham*, 294 U. S. 207, 210. In view of the remarks of the trial judge directed against the Woolworth Company, we think it had a just right to complain that the amount of damages imposed ought not to stand.

We would reverse and remand this case for a new trial by another judge.

Syllabus.

PUBLIC SERVICE COMMISSION OF UTAH ET AL. *v.* WYCOFF COMPANY, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 44. Argued November 13, 1952.—Decided December 22, 1952.

Respondent commenced in a Federal District Court a suit in equity seeking two kinds of specific relief: (1) a declaratory judgment that its carriage of motion picture film and newsreels between points in Utah constitutes interstate commerce, and (2) an injunction against the State Commission interfering with such transportation over routes authorized by the Interstate Commerce Commission. Respondent offered no evidence of any past, pending or threatened action by the State Commission touching its business in any respect. The District Court, in dismissing the complaint after trial, made a general finding that no such interference had been made or threatened; and this finding was not reversed or mentioned by the Court of Appeals. *Held:* The suit cannot be entertained as one for injunction and should not be continued as one for a declaratory judgment. Pp. 239–249.

1. There can be no injunction on constitutional grounds in this case. It is wanting in equity because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction. Pp. 240–241.

2. Declaratory relief is not appropriate under the circumstances of this case. Pp. 241–249.

(a) The Declaratory Judgment Act, 28 U. S. C. § 2201, is an enabling Act which confers a discretion on the courts rather than an absolute right upon the litigant. P. 241.

(b) The remedy afforded by the Act is available only in cases of actual controversy which admit of an immediate and definite determination of the legal rights of the parties. Pp. 242–243.

(c) The propriety of declaratory relief in a particular case depends upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power. Pp. 243–244.

(d) Discretionary use of the Declaratory Judgment Act does not permit the grant of declaratory relief to respondent merely to

hold it in readiness for use should the State Commission at any future time attempt to apply to respondent any part of a complicated regulatory statute. P. 245.

(e) The declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. Pp. 246–247.

(f) As here invoked, the declaratory judgment proceeding is inappropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. P. 247.

(g) Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which determines whether there is federal-question jurisdiction in the District Court. P. 248.

(h) Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. P. 248.

195 F. 2d 252, reversed.

Respondent's suit in equity for a declaratory judgment and injunction against petitioners was dismissed by the District Court. The Court of Appeals reversed. 195 F. 2d 252. This Court granted certiorari. 343 U. S. 975. *Reversed with directions that the action be dismissed,* p. 249.

Wood R. Worsley argued the cause for petitioners. With him on the brief were *C. W. Ferguson* and *D. A. Skeen.*

Harold S. Shertz and *Wayne C. Durham* argued the cause and filed a brief for respondent.

John P. Randolph filed a brief for the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* urging reversal.

MR. JUSTICE JACKSON delivered the opinion of the Court.

As this suit in equity was commenced in United States District Court it sought two kinds of specific relief: (1) a declaratory judgment that complainant's carriage of motion picture film and newsreels between points in Utah constitutes interstate commerce; (2) that the Public Service Commission of Utah and its members be forever enjoined from interfering with such transportation over routes authorized by the Interstate Commerce Commission.

The complaint alleged a course of importing, processing and transporting picture film and newsreels to support the contention that carriage between points in Utah was so integrated with their interstate movement that the whole constituted interstate commerce. It averred that the Commission and its members "threaten to and are attempting to stop and prevent plaintiff from transporting motion picture film and newsreels between points and places within the State of Utah, and they are thereby interfering with the conduct of interstate commerce by the plaintiff and imposing an undue burden upon interstate commerce," and that unless the defendants are enjoined they will "block, harass and prevent plaintiff in the transportation of said motion picture film and newsreels in Utah."

The Commission and its members answered that respondent's transportation between points in Utah was nothing more than intrastate commerce. They specifically denied attempting, threatening, or intending to interfere with or burden interstate commerce.

The District Court, after trial, sustained the contention of the Commission and dismissed the complaint. The Court of Appeals considered only "whether the intrastate transportations are nonetheless integral parts of in-

terstate transportations." [1] It held the evidence to warrant an affirmative answer, reversed the judgment of the District Court and ordered further proceedings in conformity with that view. We granted certiorari,[2] requesting counsel to discuss whether a single judge could hear and determine the case in view of 28 U. S. C. § 2281. That section provides that an injunction restraining enforcement of a state statute or the order of an administrative body thereunder "shall not be granted" upon the ground of unconstitutionality unless the application is heard and determined by a district court of three judges as provided in 28 U. S. C. § 2284.

The respondent, which was plaintiff, contends that a three-judge court was not required, because the suit does not question constitutionality of any Utah statute nor the validity of any order of the State Commission. It says also that no injunction has been granted or even urged "outside of the naked recitation in the prayer of the Complaint." It offered no evidence whatever of any past, pending or threatened action by the Utah Commission touching its business in any respect. The pleadings made that a clear-cut issue, which seems to have been completely ignored thereafter. The only issues defined on pretrial hearing were whether as matter of fact and of law the within-state transportation constituted interstate commerce. The trial court, however, made a general finding that no such interference had been made or threatened, which was not reversed or mentioned by the Court of Appeals.

For more reasons than one it is clear that this proceeding cannot result in an injunction on constitutional grounds. In addition to defects that will appear in our discussion of declaratory relief, it is wanting in equity

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[1] 195 F. 2d 252.

[2] 343 U. S. 975.

because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction.

The respondent appears to have abandoned the suit as one for injunction but seeks to support it as one for declaratory judgment, hoping thereby to avoid both the three-judge court requirement and the necessity for proof of threatened injury. Whether declaratory relief is appropriate under the circumstances of this case apparently was not considered by either of the courts below. But that inquiry is one which every grant of this remedy must survive.

The Declaratory Judgment Act of 1934, now 28 U. S. C. § 2201, styled "creation of remedy," provides that in a case of actual controversy a competent court may "declare the rights and other legal relations" of a party "whether or not further relief is or could be sought." This is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.

Previous to its enactment there were responsible expressions of doubt that constitutional limitations on federal judicial power would permit any federal declaratory judgment procedure. Cf. *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Willing* v. *Chicago Auditorium Assn.,* 277 U. S. 274; *Arizona* v. *California,* 283 U. S. 423; *Piedmont & N. R. Co.* v. *United States,* 280 U. S. 469. Finally, as the practice extended in the states, we reviewed a declaratory judgment rendered by a state court and held that a controversy which would be justiciable in this Court if presented in a suit for injunction is not the less so because the relief was declaratory. *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249. Encouraged by this and guided by the experience of the thirty-four states that had enacted such laws, the Senate Judiciary Committee recommended an adaptation of the principle to federal practice. Its enabling clause was narrower

than that of the Uniform Act adopted in 1921 by the Commissioners on Uniform State Laws, which gave comprehensive power to declare rights, status and other legal relations. The Federal Act omits status and limits the declaration to cases of actual controversy.[3]

This Act was adjudged constitutional only by interpreting it to confine the declaratory remedy within conventional "case or controversy" limits. In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325, the Court said, "The Act of June 14, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power" which still was to be tested by such established principles as that "the judicial power does not extend to the determination of abstract questions" and that "claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention."

In *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, Mr. Chief Justice Hughes used the whole catalogue of familiar phrases to define and delimit the measure of this new remedy. If its metes and bounds are not clearly marked, it is because his available verbal markers are themselves elastic, inconstant and imprecise. It applies, he points out, only to "cases and controversies in the constitutional sense" of a nature "consonant with the exercise of the judicial function" and "appropriate for judicial determination." Each must present a "justiciable controversy" as distinguished from "a difference or dispute of a hypothetical or abstract character . . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law

[3] See 28 U. S. C. § 2201.

would be upon a hypothetical state of facts." The relief is available only for a "concrete case admitting of an immediate and definitive determination of the legal rights of the parties." *Id.*, at 240, 241.

Other sources have stated relevant limitations. The Senate Judiciary Committee report regarded the 1,200 American decisions theretofore rendered on the subject as establishing that "the issue must be real, the question practical and not academic, and the decision must finally settle and determine the controversy." [4] Indeed the Uniform Act, unlike the Federal Act, expressly declares the discretion of the court to refuse a decree that would not "terminate the uncertainty or controversy giving rise to the proceeding." In recommending Rule 57 of the Federal Rules of Civil Procedure, in order to provide procedures for the declaratory decree, the Committee noted "A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case . . . ." [5]

But when all of the axioms have been exhausted and all words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especialy in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. Such differ-

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[4] S. Rep. No. 1005, 73d Cong., 2d Sess., p. 6, May 10, 1934; Borchard, Declaratory Judgments (2d ed. 1941), 1043, 1048.

[5] Borchard, *op. cit.*, 1042.

ences of opinion or conflicts of interest must be "ripe for determination" as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.

The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete regulatory step. It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce. One naturally asks, "So what?" To that ultimate question no answer is sought.

A multitude of rights and immunities may be predicated upon the premise that a business consists of interstate commerce. What are the specific ones in controversy? The record is silent and counsel little more articulate. We may surmise that the purpose to be served by a declaratory judgment is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is "to *guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission." (Emphasis supplied.)

In this connection, *Wycoff Co.* v. *Public Service Commission,* —— Utah ——, 227 P. 2d 323 (1951), is brought to our attention. From this it appears that respondent and its predecessors in interest long made it a practice to obtain from the Utah Commission certificates to authorize this carriage of film commodities between points in Utah. But the Supreme Court of Utah, in the cited case, sustained the Commission in denying such an application

upon a finding that the field already was adequately served. We are also told that the Commission filed a petition in a Utah state court to enjoin respondent from operating between a few specified locations within the State, but that process was never served and nothing in the record tells us what has happened to this action. We may conjecture that respondent fears some form of administrative or judicial action to prohibit its service on routes wholly within the State without the Commission's leave. What respondent asks is that it win any such case before it is commenced. Even if respondent is engaged solely in interstate commerce, we cannot say that there is nothing whatever that the State may require. *Eichholz* v. *Commission,* 306 U. S. 268, 273.

A declaratory judgment may be the basis of further relief necessary or proper against the adverse party (28 U. S. C. § 2202). The carrier's idea seems to be that it can now establish the major premise of an exemption, not as an incident of any present declaration of any specific right or immunity, but to hold in readiness for use should the Commission at any future time attempt to apply any part of a complicated regulatory statute to it. If there is any more definite or contemporaneous purpose to this case, neither this record nor the briefs make it clear to us. We think this for several reasons exceeds any permissible discretionary use of the Federal Declaratory Judgment Act.

In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us. If and when the State Commission takes some action that raises an issue of its power,

some further declaration would be necessary to any complete relief. The proposed decree cannot end the controversy.

Nor is it apparent that the present proceeding would serve a useful purpose if at some future date the State undertakes regulation of respondent. After a sifting of evidence and a finding of facts as they are today, there is no assurance that changes of significance may not take place before the State decides to move. Of course, the remedy is not to be withheld because it necessitates weighing conflicting evidence or deciding issues of fact as well as law. That is the province of courts. *Aetna Life Insurance Co.* v. *Haworth, supra,* at 242, and see *Perkins* v. *Elg,* 307 U. S. 325; *Currin* v. *Wallace,* 306 U. S. 1. But when the request is not for ultimate determination of rights but for preliminary findings and conclusions intended to fortify the litigant against future regulation, it would be a rare case in which the relief should be granted. Cf. *Coffman* v. *Breeze Corporations, Inc.,* 323 U. S. 316.

Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41; *Eccles* v. *Peoples Bank,* 333 U. S. 426. See *Colegrove* v. *Green,* 328 U. S. 549. Responsibility for effective functioning of the administrative process can-

not be thus transferred from the bodies in which Congress has placed it to the courts.

But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata,* so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by

the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed.[6] The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454; *The Fair* v. *Kohler Die & Specialty Co.,* 228 U. S. 22; *Taylor* v. *Anderson,* 234 U. S. 74.

Since this case should be dismissed in any event, it is not necessary to determine whether, on this record, the

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[6] See, Developments in the Law—Declaratory Judgments, 62 Harv. L. Rev. 787, 802.

alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction. But we advert to doubts upon that subject to indicate the injury that would be necessary if the case clearly rested merely on threatened suit in state court, as, for all we can learn, it may.

We conclude that this suit cannot be entertained as one for injunction and should not be continued as one for a declaratory judgment. The judgment below should be reversed and modified to direct that the action be dismissed.

Reversed and so ordered.

MR. JUSTICE REED, concurring.

The record, although uncertain and unsatisfactory, convinces me that a suit was filed in the state court by the Public Service Commission of Utah. This state suit evidently sought to prevent respondent from transporting motion picture film and newsreels between points and places within the State of Utah. This is the portion of transportation between out-of-state points and motion picture exhibitors within Utah that raises the question as to the authority of respondent to operate under the Interstate Commerce Commission certificate. The films are unloaded at Salt Lake City, where they are prepared for exhibition, and stored by the owners until ordered out to the exhibition points. They are then again loaded on respondent's trucks and delivered to the exhibitors. If this final part of the transportation continues the interstate commerce, respondent would be free to operate without further authority from the Utah Commission. If it is intrastate commerce, respondent would need further authority from Utah. It was apparently to determine this question that the Utah Commission filed its suit in the state court. No process was

served. Thereafter respondent instituted this proceeding for a declaratory judgment.

The authority for this litigation is the Declaratory Judgment Act of 1934, 28 U. S. C. § 2201. This provides for a judgment declaring "the rights and other legal relations of any interested party" in cases "of actual controversy."

The Act was intended by Congress as a means for parties in such controversies as that between this interstate carrier and the Utah Commission to settle their legal responsibilities and powers without the necessity and risk of violation of the rights of one by the other. The controversy here is clear and definite. A decision would settle the issue that creates the uncertainty as to the parties' rights. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227. The Act intended operations to be conducted in the light of knowledge rather than the darkness of ignorance. S. Rep. No. 1005, 73d Cong., 2d Sess.

However, it was recognized that the Declaratory Judgment Act introduced a new method for determining rights into the body of existing law. Therefore the language of the Act was deliberately cast in terms of permissive, rather than mandatory, authority to the courts to take cognizance of petitions seeking this new relief.[1] This enables federal courts to appraise the threatened injuries to complainant, the necessity and danger of his acting at his peril though incurring heavy damages, the adequacy of state or other remedies, particularly in controversies with administrative bodies. But even in respect to controversies with administrative bodies, the Declaratory Judgment Act exists as an instrument to protect the citizen against the dangers and damages that may result

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[1] H. R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2; Borchard, Declaratory Judgments (2d ed. 1941), 312; *Brillhart* v. *Excess Insurance Co.,* 316 U. S. 491, 494.

from his erroneous belief as to his rights under state or federal law. *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 300. Cf. *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, 105; *Spector Motor Service* v. *O'Connor,* 340 U. S. 602, 605. It is a matter of discretion with federal courts.

The use of this new method of settlement was illustrated a few years ago in an important case dealing with the jurisdiction of the National Railroad Adjustment Board.[2] That case involved a disagreement between two divisions of the National Railroad Adjustment Board as to which division had jurisdiction of disputes involving yardmasters. We held that the settlement of such a jurisdictional dispute concerning an administrative agency was a proper subject for a declaratory judgment where the controversy resulted in a complete stalemate. Here, the record does not show any unusual danger of loss or damage to respondent, a suit had already been filed and the record shows no reason why its result would not settle this controversy. Because of these circumstances, I concur with the reversal of the judgment.

MR. JUSTICE DOUGLAS, dissenting.

Respondents hold a certificate of public convenience and necessity from the Interstate Commerce Commission for the transportation of motion picture films and newsreels from Salt Lake City, Utah, to points in Utah, Idaho, and Montana. Their transportation to Utah points is interstate commerce according to the Court of Appeals; and with that conclusion I agree since the movement in Utah is part of a continuing interstate stream. The threat of interference with that interstate activity by the Utah Public Service Commission is clear and immediate. *First.* The Utah Commission brought suit to enjoin those interstate activities and that suit is now pending

[2] *Order of Conductors* v. *Swan,* 329 U. S. 520.

in the Utah court. *Second.* The Commission's answer in the District Court denied that it was interfering with interstate commerce, not because it did not intend to prevent respondent from operating, but on the ground that the operations were deemed to be intrastate commerce and therefore subject to its regulation. Similarly, the District Court's finding that there was no interference with interstate commerce was based on an acceptance of the Commission's contentions as to the nature of respondent's business. *Third.* In their brief here petitioners assert that the Utah Commission *"will prevent the respondent from conducting"* this business *"unless and until he is authorized to do so by appropriate administrative order"* of the Utah Commission, since in the Commission's view the transportation is in intrastate commerce.

That for me is threat enough. Moreover, Utah is not attempting to regulate a phase of interstate business that is within the reach of a State's police power. She is endeavoring to make respondent obtain a permit to do an *interstate* business for which the respondent already holds a federal permit, under threat that unless he obtains a Utah permit, Utah will stop him from conducting the *interstate* business. That is an attempt to regulate in a field pre-empted by the Congress under the Motor Carrier Act (49 U. S. C. §§ 301 *et seq.*). That kind of regulation is precluded by our decision in *Buck* v. *Kuykendall,* 267 U. S. 307.

Thus the controversy is definite and concrete and involves legal interests of adverse parties. The test laid down for declaratory judgments by *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, is thus satisfied. I have said enough to show that the judges who heard this case below knew that they were dealing with a live, active contest that threatened serious consequences to respondent, not

with a hypothetical question that might have practical repercussions only in the remote future.

The fact that the Utah court can adjudicate the controversy in the pending state case is no reason why the federal court should stay its hand. There is no federal policy indicating that this is a field in which federal courts should be reluctant to intervene. That was the case in *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, where we held that declaratory relief that a state tax was unconstitutional should be denied by the federal court. The basis of our ruling was that since Congress had prohibited the federal courts from enjoining state taxes where an adequate remedy was available in the state courts (cf. *Hillsborough* v. *Cromwell,* 326 U. S. 620, 623), declaratory relief should also be withheld. Congress here has given no indication that the integrity of permits granted interstate carriers by the Interstate Commerce Commission should be protected in the state rather than in the federal courts. All the presumptions are contrary. The basis of the jurisdiction of the District Court created by Congress is clear. The case "arises under the Constitution" and "laws" of the United States. 28 U. S. C. § 1331. It is proper that the federal court, absent such special circumstances as the *Huffman* case presented, exercise that jurisdiction and protect the federal right.

The failure to do it here relegates the declaratory judgment to a low estate.

KING ET AL., CONSTITUTING THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 9. Argued October 15, 1952.—Decided December 22, 1952.

1. In prescribing intrastate freight rates for railroads under § 13 (4) of the Interstate Commerce Act, the Interstate Commerce Commission may give weight to deficits in passenger revenue. Pp. 260–267.

   (a) Under § 15a (2) of the Interstate Commerce Act and the National Transportation Policy of 1940, the Commission may give weight to passenger revenue deficits in prescribing *interstate* freight rates to meet over-all revenue needs. Pp. 263–264.

   (b) The same National Transportation Policy applies to § 13 (4) as to § 15a (2). Whichever section is used, the same economic considerations underlie the relation between freight rates and passenger deficits, whether interstate or intrastate. P. 266.

2. The findings of the Commission which are involved in this proceeding are sufficient to sustain the Commission's order prescribing intrastate freight rates, for Florida railroads, which will reflect the same increases as have been authorized by the Commission for comparable interstate traffic. Pp. 267–276.

   (a) *North Carolina* v. *United States*, 325 U. S. 507, distinguished. Pp. 270–274.

   (b) To permit material and reports which were before the Commission in prescribing a nationwide increase in interstate freight rates and in further increasing interstate freight rates for the southern territory (including Florida) to be applied under § 15a but not under § 13 (4) would be contrary to the complementary nature of those sections. Pp. 272–273.

   (c) The Commission's jurisdiction over intrastate rates is not limited to cases where those rates are confiscatory. It is sufficient that the existing intrastate rates cause "unjust discrimination against interstate or foreign commerce." P. 274.

   (d) Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a

whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory, but it is well to leave the way open for modifications of that general order in specific situations where the general order is not justly applicable. Pp. 275–276.

101 F. Supp. 941, affirmed.

A three-judge District Court sustained an order of the Interstate Commerce Commission prescribing intrastate freight rates for Florida railroads. 101 F. Supp. 941. On appeal to this Court under 28 U. S. C. (Supp. V) §§ 1253, 2101 (b), *affirmed,* p. 276.

Lewis W. Petteway argued the cause and filed a brief for appellants.

Charles H. Weston argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp, James L. Morrisson* and *Edward M. Reidy. Philip B. Perlman,* then Solicitor General, and *Daniel W. Knowlton* were on a motion to affirm.

Frank W. Gwathmey argued the cause for the Atlantic Coast Line Railroad Co. et al., appellees. With him on the brief was *James A. Bistline.*

Arnold H. Olsen, Attorney General, *Charles V. Huppe,* Assistant Attorney General, and *Edwin S. Booth* filed a brief for the State of Montana et al., as *amici curiae,* urging reversal.

Mr. Justice Burton delivered the opinion of the Court.

The questions here are: (1) whether the Interstate Commerce Commission, in prescribing intrastate freight rates for railroads under § 13 (4) of the Interstate Com-

merce Act,[1] may give weight to deficits in passenger revenue; and (2) whether the findings of the Commission which are involved in this proceeding are sufficient to sustain the rates it has prescribed. Our answer to each question is in the affirmative.

This is an action against the United States brought in the United States District Court for the Northern District of Florida, under 28 U. S. C. (Supp. V) § 1336, by appellants "as and Constituting the Florida Railroad and Public Utilities Commission." They ask the court to enjoin, set aside and annul an order of the Interstate Commerce Commission requiring Florida railroads to establish intrastate freight rates which will reflect the same increases as have been authorized by it for comparable interstate traffic.

The underlying proceedings originated in 1940. The Interstate Commerce Commission then undertook a nationwide investigation of interstate railroad freight rates, under §§ 13 (2) and 15a (2) of the Interstate Commerce Act, in conformity with the National Transporta-

[1] "(4) Whenever in any such investigation [where rates made by authority of a state are in issue] the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any *undue, unreasonable, or unjust discrimination against interstate or foreign commerce,* which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." (Italics supplied.) 41 Stat. 484, 49 U. S. C. § 13 (4).

tion Policy stated in § 1 of the Transportation Act of 1940.[2] The investigation dealt with past and future freight and passenger operations, intrastate as well as interstate. A Committee of Cooperating State Commissioners sat with the Commission and took part in its deliberations. Mounting railroad operating costs and declining passenger revenue led the Commission, in 1946, to authorize a nationwide increase of 20% in basic interstate freight rates. *Ex Parte No. 162, Increased Railway Rates, Fares, and Charges, 1946,* 264 I. C. C. 695, 266 I. C. C. 537.[3]

In 1947, the Commission found such further increases in operating costs and decreases in passenger revenue that it authorized an additional nationwide interim increase of 10% in interstate freight rates. Soon it raised this to 20%. In a third report it varied the percentage in different areas, with the result that in the southern territory, including Florida, the increase was 25%. The 1948 final report confirmed this 25% increase. *Ex Parte No. 166, Increased Freight Rates, 1947,* 269 I. C. C. 33, 270 I. C. C. 81, 93, and 403. The Commission's estimates of revenue contemplated the application of the increased rates to intrastate, as well as to interstate, transporta-

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[2] § 13 (2), 36 Stat. 550, as amended, 41 Stat. 484, 49 U. S. C. § 13 (2); § 15a (2), 54 Stat. 912, 49 U. S. C. § 15a (2); § 1 of the Transportation Act of 1940, inserting a preamble to the Interstate Commerce Act, 54 Stat. 899, 49 U. S. C., note preceding § 1.

[3] For earlier reports see *Ex Parte No. 148, Increased Railway Rates, Fares, and Charges, 1942,* 248 I. C. C. 545. The several proceedings under §§ 15a or 13 (4) referred to in this opinion deal at length with many commodity and other rates or charges besides those which are controlled by the general percentage increases referred to in the opinion. While such variations are important and significant in adjusting each order to specific situations, their consideration is not necessary to the determination of the issues before us. The percentages used in this opinion are those which were adopted by the court below for illustrative purposes. 101 F. Supp. 941, 943–944.

tion.[4] The report concludes with the statement that the "Committee of Cooperating State Commissioners . . . authorize us to state that they concur in the foregoing report." 270 I. C. C. 403, 463.

Upon publication of these reports, the railroads asked their respective state authorities to authorize comparable increases in intrastate rates. The Florida Commission approved most of the increases but declined to approve the final increase from 20% to 25%.[5]

On petition of the Florida railroads, the Interstate Commerce Commission undertook its own investigation of Florida intrastate railroad rates under § 13 (3) and

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[4] In *Ex Parte No. 166*, 270 I. C. C. 403, 421, the tabulations of overall percentage increases in freight rates include intrastate traffic. The report says: "The table which relates to class I railroads, covers all traffic, intrastate as well as interstate, and assumes increases to have been approved on intrastate traffic similarly to those upon interstate traffic in the same territory, for the whole time." In referring to revenue from operations for a "constructive," normal year, the report says: "This estimate is upon the assumption that timely similar adjustments will be made upon intrastate traffic." *Id.*, at 428. As to rates of return on property values, it adds: "They presuppose that generally similar increases will be permitted by State authorities on intrastate traffic, or may become effective otherwise." *Id.*, at 437. See also, 269 I. C. C. at 39, 94–95, and 270 I. C. C. at 440.

[5] In response to requests based upon *Ex Parte No. 162, supra,* the Florida Commission granted the original 20% general increase in intrastate freight rates but declined to allow increases in intrastate rates on logs moving to the mills, wet phosphate moving from the washer to the drying plant, waste wood moving to retort or recovery plant and sugar cane moving to the mills. It also limited rate increases on pulpwood to 9%. In response to requests to conform to *Ex Parte No. 166, supra,* the Florida Commission granted the additional 20% general increase in intrastate freight rates, but declined to approve the further 5% increase. It also made specific exceptions in favor of certain commodities. As the issues with which we are concerned are sufficiently raised by the Florida Commission's action denying the final 5% increase, we confine our discussion to that item.

(4) of the Interstate Commerce Act, 41 Stat. 484, 49 U. S. C. § 13 (3) and (4). A full hearing was had before a Commissioner and an examiner, followed by a hearing upon exceptions to the examiner's report.[6] The Commission recommended that intrastate freight rates be established "between points in Florida which will reflect the same increases as are, and for the future may be, maintained by respondents [railroads] on like interstate traffic to and from Florida, and within Florida under our authorizations in Ex Parte No. 162 and Ex Parte No. 166 . . . ." Finding No. 8, 278 I. C. C. 41, 73.

The Interstate Commerce Commission then gave the Florida Commission a final opportunity to permit the increased rates to be applied to intrastate transportation. Upon the latter's failure to act, the Interstate Commerce Commission ordered the railroads "thereafter to maintain and apply for the intrastate transportation of freight from and to points in the State of Florida freight rates and charges which shall be no lower than the approved rates and charges, or on the approved rate bases, as provided in said report." [7]

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[6] While the Commission states that its conclusions differ from those in the proposed report of the examiner, they do not so differ on the issues before us.

[7] For other decisions of the Commission as to intrastate rates under § 13 (3) and (4), growing out of *Ex Parte Nos. 162* or *166, supra,* see *Increases in Alabama Freight Rates and Charges,* 274 I. C. C. 439; *Texas Intrastate Rates,* 273 I. C. C. 749; *Increases in Tennessee Freight Rates and Charges,* 272 I. C. C. 625. See also, *Increases in Arizona Freight Rates and Charges,* 270 I. C. C. 105. A recent decision, growing out of *Ex Parte No. 168, Increased Freight Rates, 1948,* 276 I. C. C. 9, is *Montana Intrastate Freight Rates and Charges,* 284 I. C. C. 167. The intrastate rates there ordered into effect by the Commission were set aside in *Montana* v. *United States,* 106 F. Supp. 778, and 786; judgment vacated and cause remanded by this Court for further consideration in the light of the instant case, *post,* p. 905.

Before that order took effect, this action was filed. A three-judge District Court was convened. 28 U. S. C. (Supp. V) § 2325. Two short line railroads and numerous shippers intervened as plaintiffs. The Interstate Commerce Commission and all Class I railroads operating in Florida intervened as defendants. The entire record of the proceeding before the Commission, under § 13 (4), was introduced. The court sustained the Commission and dismissed the complaint. 101 F. Supp. 941. That judgment is here on appeal. 28 U. S. C. (Supp. V) §§ 1253, 2101 (b).

I. *The Interstate Commerce Commission in prescribing intrastate freight rates for railroads under § 13 (4) of the Interstate Commerce Act may give weight to deficits in passenger revenue.*

In *Ex Parte No. 168, Increased Freight Rates, 1948,* 272 I. C. C. 695, 276 I. C. C. 9, the Commission reviewed the changing attitudes it has adopted concerning the role of passenger deficits and freight rates. In such cases as the *Five Per Cent Case,* 31 I. C. C. 351, the Commission in 1914 concluded that each class of service should completely and independently provide its own proportionate share of expenses and profits.[8] In 1949 the Commission says:

> "However, because of changed theories adopted by Congress in the Transportation Act, 1920, and

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[8] The Commission there said:

"We know of no provision of law under which we should be justified in increasing freight rates to provide a return upon property used exclusively in the passenger service, much less to take care of losses incurred in such service. In our opinion each branch of the service should contribute its proper share of the cost of operation and of return upon the property devoted to the use of the public." 31 I. C. C. at 392.

because as a practical matter the increasing degree of unprofitableness of the passenger traffic menaced the continuity of an adequate national system of transportation, we were forced to a more comprehensive view of this question. We observe, also, that at the time of those decisions the railroads enjoyed a practical monopoly in supplying transportation, but that situation no longer exists." 276 I. C. C. at 34.

Citing with approval its similar views in *Ex Parte No. 103, Fifteen Per Cent Case, 1931,* 178 I. C. C. 539, and *Ex Parte No. 123, Fifteen Per Cent Case, 1937–1938,* 226 I. C. C. 41, the Commission summarizes its present position as follows:

"These cases are typical of our more recent holdings upon this question. While we regard it as 'trite to say that each particular service, coach, sleeper, parlor car, and head end, should as nearly as may be pay its own way and return a profit' (*Eastern Passenger Fares in Coaches,* 227 I. C. C. 17, 25), and we have accepted the contention that there may be traffic that should not be burdened with a shortage of passenger service return (*Livestock, Western District Rates,* 190 I. C. C. 611, 629), yet, if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations. Both may be subjected to reasonable rates and charges to produce the fair aggregate return, even though thereby a higher rate of return may be exacted from the one than from the

other. (*Property Owners' Committee* v. *Chesapeake & O. Ry. Co.*, 237 I. C. C. 549, 565.)" *Id.*, at 35. See also, *Ex Parte 87, Revenues in Western District*, 113 I. C. C. 3, 23.

This change of policy was the inevitable consequence of steadily increasing passenger operating costs, together with the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficits by increasing passenger rates. The railroads were forced to abandon passenger mileage, reduce service and improve their facilities, while fixing passenger rates at a level as adequate as competition permitted.[9]

In recent years, a nationwide passenger deficit has been obvious except during the peak of wartime passenger traffic. The ratio between passenger operating expense and revenue has varied in different areas but has been uniformly unfavorable to the railroads.[10]

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[9] Passenger service involves not only transportation of people but of mail, express, baggage, milk and other "head-end" services requiring the speed and service of passenger trains. These operations have shown a national operating deficit in each year from 1936 through 1948. 276 I. C. C. at 38.

[10] ". . . Between the end of 1923 and the beginning of the present year [1948], the miles of line operated in passenger service of the class I roads decreased from 224,762 to 159,373 . . . or 29.1 percent in 26 years. . . . In addition to total abandonments, much curtailment of service has occurred, which is impossible to portray statistically.

. . . . . .

". . . From 1923 through 1933 both the number of passengers carried and the revenues from passenger fares declined uninterruptedly. Passengers carried declined from slightly less than 1 billion in the earlier year to less than half that figure, or 433 millions, in round numbers, in the later year. Revenues from passenger fares fell from $1,148 millions to $329 millions, a decline between these 2 years of more than 70 percent. This development was accompanied, except

Section 15a (2) of the Interstate Commerce Act and the National Transportation Policy of 1940 [11] reflect this broad concept of the unity of the Nation's transportation system. They direct the Commission to consider,

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for 1 year, by an uninterrupted increase in the passenger service operating ratio from 81.29 percent in 1923 to 101.22 percent in 1930, the latter being the first year of the 11 years 1920–30 in which there was an operating deficit in this service. Since that year there has been an annual operating deficit in passenger service, except during the war years 1942–45.

. . . . .

"Passenger service operating ratios and net railway operating deficits in 1948, by specified districts and regions

District or region	Operating ratio	Net railway operating deficit
Eastern district	120. 8	$216, 450, 000
Pocahontas region	177. 8	35, 725, 000
Southern region	127. 3	72, 982, 000
Western district	132. 2	234, 625, 000
Total	127. 4	559, 782, 000"

276 I. C. C. at 36, 40; see also, pp. 14–31 for data as to value, revenue, expenses, operating income, rate of return, traffic, efficiency, etc., and pp. 32–40 as to passenger deficits.

See Moulton, The American Transportation Problem, c. V (1933); 63d, 64th and 65th Annual Reports of the Interstate Commerce Commission, at pp. 3, 5 and 41, respectively.

[11] "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 54 Stat. 912, 49 U. S. C. § 15a (2).

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes

among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service. It permeates such general revenue proceedings as *Ex Parte Nos. 162* and *166, supra.* It leaves no ground for a claim that the Commission may not give weight to passenger revenue deficits in prescribing *interstate* freight rates to meet over-all revenue needs. See *United States* v. *Louisiana,* 290 U. S. 70.

The question remains whether that Commission may give weight to deficits in passenger revenue (either interstate or intrastate) when prescribing *intrastate* freight rates under § 13 (4). It is conceivable that some considerations properly given weight by the Commission in prescribing interstate freight rates in a general revenue proceeding might not be applicable equally to transportation within a particular state.

In the instant case, however, there is no showing that the character of operating conditions in Florida intrastate passenger traffic differs substantially from that of inter-

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of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899, 49 U. S. C., note preceding § 1.

state passenger operations in the southern territory generally. On the contrary, the Commission observes that—

> "Increased passenger deficits, by reason of the continuing rise in operating expenses and the growing use of other forms of transportation, is a condition bearing alike upon intrastate and interstate rates. There is here no claim or showing that the passenger deficits of the respondents do not result from intrastate as well as interstate operations, and the passenger deficit of the East Coast, which operates entirely within Florida, would appear to indicate to the contrary.
>
> "The record affords no justification for a difference in treatment in this respect [passenger deficits] between Florida intrastate traffic, on the one hand, and interstate traffic to and from Florida, on the other hand. The question of passenger deficits is a serious one for both carriers and shippers, and would become even more serious for interstate shippers if this burden were imposed entirely upon them [rather than being shared on a like basis with intrastate shippers on the same lines]." 278 I. C. C. at 67–68. See opinion below, 101 F. Supp. at 944.

It appears from the report in *Ex Parte No. 168,* 276 I. C. C. at 40, that, in 1948, the passenger service operating ratio for the southern territory was 127.3% while the operating ratios of the three principal Florida railroads in that year were 120%, 127% and 128%. In Florida, moreover, the discontinuance of railroad passenger service would not permit the discontinuance of high-speed tracks and equipment because of the need for fast freight schedules to transport perishable fruits and vegetables from Florida. The Commission dealt with the freight and passenger revenues and properties of the Florida roads as a

whole when determining the need for increases in interstate freight rates. Nothing has been demonstrated which would demand different treatment of these properties in relation to the intrastate activities.

The Commission also finds that "the Florida intrastate rates [without the 5% increase] . . . are abnormally low and are not contributing their fair share to the revenues required by respondents [Florida railroads] to enable them to render adequate and efficient service and to operate profitably, and thereby accomplish the purpose of the Interstate Commerce Act . . . ." Finding No. 5, 278 I. C. C. at 72.

In the instant case there is no evidence which would require the Commission to treat Florida intrastate rates differently from interstate rates in southern territory. Instead, there are findings that it would cause unjust discrimination against interstate commerce in Florida if the intrastate freight rates are not increased so as to reflect the same increase as is applied by the Commission to like interstate traffic in the southern territory. See note 13, *infra.*

The same National Transportation Policy applies to § 13 (4) as to § 15a (2). Whichever section is used, the same economic considerations underlie the relation between freight rates and passenger deficits, whether interstate or intrastate. This was well considered throughout the opinion of the Court in *United States* v. *Louisiana, supra.* It was there said:

> "This Court has consistently held that this section [§ 13 (4)] is to be construed in the light of § 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of § 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. So

construed, § 13 (4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate." Pp. 74–75.

This was confirmed in *Florida* v. *United States,* 292 U. S. 1, 5–6.

We conclude that there is no reason why the Commission may not give weight to passenger deficits in prescribing the intrastate freight rates in Florida, as it does in prescribing interstate freight rates for the southern territory.[12]

II. *The Commission's findings involved in this proceeding are sufficient to sustain the rates prescribed.*

Several of the Commission's findings which lend support to its order are printed in the margin.[13] Its author-

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[12] *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, and *Norfolk & W. R. Co.* v. *Conley,* 236 U. S. 605, favor, rather than oppose, this position. In those cases this Court enjoined state authorities from attempting to restrict an intrastate railroad to confiscatorily low freight or passenger rates. Such action, however, carried no implication that the United States' authority to provide relief is limited to cases of threatened confiscation. In the instant case the Interstate Commerce Commission is authorized by Congress, under §§ 15a (2) and 13 (4), to override state-prescribed rates which unjustly discriminate against interstate commerce, whether or not the state rates are also confiscatory.

[13] "2. That the transportation *conditions incident to the intrastate transportation of freight in Florida are not more favorable* and such conditions in the Florida peninsula are somewhat less favorable than those (1) within southern territory and (2) between Florida and interstate points.

"3. That the *present interstate freight rates* and charges within Florida and between points in Florida and points in other States

ity to prescribe the rates now before us rests on the provision, in § 13 (4), that when it finds that an intrastate rate causes "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce . . ." it shall prescribe such rate as, in its judg-

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are just and reasonable . . . and that *intrastate rates,* charges, and minimum weights *herein approved will not exceed a just and reasonable level.*

. . . . . .

"5. That the *Florida intrastate rates,* charges, and minimum weights, *which are below the level herein authorized, are abnormally low and are not contributing their fair share to the revenues* required by respondents to enable them to render adequate and efficient service and to operate profitably, and thereby accomplish the purpose of the Interstate Commerce Act, and as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense; and that the *burden thus cast upon interstate commerce is undue* to the extent that these intrastate rates and charges are less than they would be on the basis herein approved.

"6. That the establishment of *intrastate rates* and charges *increased sufficiently to equal the level herein approved will substantially increase respondents' revenues therefrom, and will constitute not more than a fair proportion of respondents' total income* . . . .

"7. That the maintenance of *intrastate rates* and charges *within Florida on bases lower than those herein approved causes, and in the future will cause, (1) in all instances, unjust discrimination against interstate commerce,* (2) in nearly all instances, undue preference of and advantage to localities in intrastate commerce, and undue prejudice to localities in interstate commerce; . . . .

"8. That this unjust discrimination and undue prejudice should be removed by establishing intrastate rates and charges between points in Florida which will reflect the same increases as are, and for the future may be, maintained by respondents on like interstate traffic to and from Florida, and within Florida under our authorizations in Ex Parte No. 162 and Ex Parte No. 166, modified as herein indicated and as proposed before the Florida commission in proceedings referred to herein: . . . (5) that no intrastate rate or charge shall be increased so that it will exceed the lowest level of the corresponding rates or charges contemporaneously maintained generally on inter-

ment, will remove the discrimination. Note 1, *supra.* The Commission's finding No. 7 meets this requirement. The Commission there finds that the maintenance of the existing intrastate rates within Florida "on bases lower than those herein approved causes, and in the future will cause, (1) in all instances, unjust discrimination against interstate commerce . . . ." 278 I. C. C. at 73. If supported by adequate subsidiary findings, this ultimate finding thus sustains the authority of the Commission and the validity of its order.[14] *North Carolina* v. *United States,* 325 U. S. 507, 514; *Florida* v. *United States,* 292 U. S. 1;

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state traffic to and from Florida points in the period from August 21, 1948, to, but not including, January 11, 1949; . . . .

"These findings are *without prejudice to the right* of the authorities of the State of Florida, or any other interested party, *to apply for a modification thereof as to any specific intrastate rates* or charges on the ground that they are not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act." (Italics supplied.) 278 I. C. C. at 72–74.

[14] An alternative provision of § 13 (4) is that whenever in such an investigation the Commission finds that an intrastate rate causes "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand . . . it shall prescribe the rate . . . thereafter to be charged . . . in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination." Note 1, *supra.* On this point the Commission's finding No. 7 states that the maintenance of intrastate rates in Florida "on bases lower than those herein approved causes, and in the future will cause . . . (2) in nearly all instances, undue preference of and advantage to localities in intrastate commerce, and undue prejudice to localities in interstate commerce; . . . ." 278 I. C. C. at 73. As to this alternative provision, see also, *Wisconsin R. Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342. In view of the above restricted finding and of the doubt expressed by the court below as to the ability of the Commission to sustain its action on that ground, we place no reliance upon this alternative here.

282 U. S. 194; *United States* v. *Louisiana,* 290 U. S. 70. The court below adds that it is "clear from the evidence in the case that it [the existing intrastate rate] did result in undue, unreasonable and unjust discrimination against interstate commerce . . . ." 101 F. Supp. 941, 945.

The nature and adequacy of the findings necessary to support an ultimate finding of "unjust discrimination against interstate commerce" were considered in *North Carolina* v. *United States, supra.* In that case this Court held that the Commission's findings were not adequate to support the Commission's order to raise state-wide intrastate passenger rates from 1.65 cents per mile to 2.2 cents per mile, although the latter rate was prescribed by the Commission as a minimum rate for comparable interstate passenger service on the same lines and trains. The finding which was primarily needed, and was there found lacking, was one that the intrastate service at 1.65 cents per mile did not contribute its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property directed to the transportation service, both interstate and intrastate.

This Court held that the mere disparity between the rates for comparable intrastate and interstate service was not enough *per se* to establish the requisite unjust discrimination. Confronted with evidence that the interstate rate of 2.2 cents per mile was above a reasonable rate level for comparable intrastate passenger service, a finding supported by evidence was held to be necessary to show the contrary. Such a finding, lacking in the *North Carolina* case, is supplied here by finding No. 3, which states that the "intrastate rates . . . herein approved will not exceed a just and reasonable level." 278 I. C. C. at 72.

In the *North Carolina* case there was no finding that the existing intrastate rate was inadequate. In fact, its

ample adequacy was indicated by evidence of an extraordinarily large volume of available traffic and profits. In contrast, the Commission, in the instant case, has found that the existing "Florida intrastate rates . . . which are below the [proposed] level herein authorized, are abnormally low and are not contributing their fair share to the revenues . . . and that the burden thus cast upon interstate commerce is undue to the extent that these intrastate rates . . . are less than they would be on the basis herein approved." Finding No. 5, *id.*, at 72–73, and see 45–59. The report adds that "the revenue loss as estimated by the respondents [railroads] because of the failure to authorize the increases herein sought is $915,325 a year." *Id.*, at 65.

Whereas in the *North Carolina* case there was evidence to indicate that the conditions in that State were more favorable to profitable intrastate transportation of passengers than in the Nation at large, here the Commission's finding No. 2 expressly states that "the transportation conditions incident to the intrastate transportation of freight in Florida are not more favorable and such conditions in the Florida peninsula are somewhat less favorable than those (1) within southern territory and (2) between Florida and interstate points." *Id.*, at 72, and see 63–67.

Supporting the conclusion that the proposed increase in the Florida intrastate freight rates will not drive away business but will prove profitable and reasonable, the Commission in its finding No. 6 says that "the establishment of intrastate rates . . . increased sufficiently to equal the level herein approved will substantially increase respondents' [railroads'] revenues therefrom, and will constitute not more than a fair proportion of respondents' total income . . . ." *Id.*, at 73.

The foregoing findings cover the needs emphasized in the *North Carolina* case. They go far beyond the bare disparity between the existing intrastate rate and the

proposed minimum rate which is in substantial uniformity with the interstate rate. These findings demonstrate that the proposed rate in Florida will be within the zone of reasonableness and, in the opinion of the Commission, will cause the intrastate freight traffic to contribute a fair share of the earnings.

The Commission has applied to the Florida operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Florida along the same lines it followed when estimating the revenues available in the southern territory from intrastate as well as interstate operations. In the absence of any showing that it is not applicable to Florida, the evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its Florida order.

The Commission in the instant case has provided that these "findings are without prejudice to the right of the authorities of the State of Florida, or any other interested party, to apply for a modification thereof as to any specific intrastate rates . . . on the ground that they are not related to the interstate rates . . . on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act." *Id.*, at 74. Certain of the rates in the original order already have been modified or removed from that order. 101 F. Supp. at 946.

No question has been raised here as to the adequacy of the evidence upon which any of the findings are based. Although no such point is urged, supporting evidence appears in the record of the "full hearing" under § 13 (4), all of which was introduced in evidence in the court below. Much of the factual material that was before the Commission in *Ex Parte No. 162* and *Ex Parte No. 166,* and the reports in those cases, were before the Commission and the court below in the present proceedings. To permit such material and reports to be applied under § 15a

but not under § 13 (4) would be contrary to the complementary nature of those sections.

> "The decision in the first proceeding, that the increase in interstate rates was reasonable, was made in the hope that the state commissions would bring intrastate rates into harmony. When they failed to do so, the Commission reaffirmed its finding that the new interstate rates were reasonable and found that the intrastate rates must be raised in order that the intrastate traffic may bear its fair share of the revenue burden. It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. Compare *American Express Co.* v. *Caldwell,* 244 U. S. 617; *United States* v. *Louisiana, supra* [290 U. S. 70]; *Florida* v. *United States, ante* [292 U. S.], p. 1." *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 483–484. See also, *Montana* v. *United States,* 106 F. Supp. 778, 783.

The appellants point out that in the *North Carolina* case, this Court mentioned the absence of other findings. Those, however, are not needed to sustain an order already supported by such findings as have been made in this case.[15]

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[15] See *Illinois Commerce Commission* v. *United States, supra; Florida* v. *United States,* 292 U. S. 1; *United States* v. *Louisiana, supra; Louisiana P. S. Commission* v. *Texas & N. O. R. Co.,* 284

For example, the *North Carolina* case mentions the absence in that case of a finding that the existing 1.65 cent per mile intrastate passenger rate was confiscatory. Such a finding, supported by competent evidence, would have provided a constitutional ground for enjoining the state rate. See *Norfolk & Western R. Co.* v. *Conley,* 236 U. S. 605; *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585. The Interstate Commerce Commission's jurisdiction over intrastate rates, however, is not limited to cases where those rates are confiscatory. It is sufficient that the existing intrastate rates cause "unjust discrimination against interstate or foreign commerce . . . ." In that event, § 13 (4) directs the Commission to prescribe intrastate rates that will remove the discrimination without raising the rate beyond the zone of reasonableness. See *United States* v. *Louisiana, supra,* at 74–75; *Florida* v. *United States,* 282 U. S. 194, 211; *Wisconsin R. Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 585–586.

Similarly, the *North Carolina* case mentions, but does not make indispensable, the specific findings in dollars which were absent there. Reference was made in the *North Carolina* case to the absence of "findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income" and also to the absence of any "finding as to what amount of revenue was required to enable these railroads to operate efficiently." 325 U. S. at 516. The Court emphasized the Commission's reliance on "the mere existence of a disparity between what it said was a reasonable interstate rate and the intrastate rate fixed by North Carolina."

U. S. 125; *Alabama* v. *United States,* 283 U. S. 776; *Georgia P. S. Commission* v. *United States,* 283 U. S. 765; *New York* v. *United States,* 257 U. S. 591; *Wisconsin R. Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563.

Ibid. In the instant case the Commission does not rely upon the mere disparity between the intrastate and interstate rates. On the contrary, the Commission states that the Florida intrastate rates "are abnormally low and are not contributing their fair share to the revenues required . . . to render adequate and efficient service and to operate profitably, and thereby accomplish the purpose of the Interstate Commerce Act . . . ." Finding No. 5, 278 I. C. C. at 72. Also, in finding No. 6, it says that the establishment of the proposed increases in intrastate rates "will substantially increase respondents' revenues therefrom, and will constitute not more than a fair proportion of respondents' total income . . . ." *Id.,* at 73. More is not needed. It is not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case.

"[T]he administrative arm of the Commission [would be] paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule." *United States* v. *Louisiana,* 290 U. S. 70, 75–76, and see 78–79. See also, *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 483; *Florida* v. *United States,* 292 U. S. 1, 9; *Georgia P. S. Commission* v. *United States,* 283 U. S. 765, 774; *Wisconsin R. Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 588. Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory.[16] At the same time it

[16] In its report the Commission says "where, as is the case here, the intrastate and the interstate traffic, as a whole, moves under substantially similar conditions, and the expense of handling the two

is well for it to leave the way open, as it did here, for modifications of that general order in specific situations where the general order is not justly applicable. *North Carolina* v. *United States, supra,* at 518, 535.

For these reasons, we conclude that the findings before us sustain the order of the Commission and that the Commission was authorized to give the weight it did to passenger deficits when prescribing intrastate freight rates. The judgment accordingly is

Affirmed.

MR. JUSTICE BLACK is of opinion that the facts found by the Commission were not adequate to support the order and would set aside the order on authority of *North Carolina* v. *United States,* 325 U. S. 507.

MR. JUSTICE DOUGLAS, with whom MR. CHIEF JUSTICE VINSON concurs, dissenting.

The Court has taken an unprecedented and, in my view, an unwarranted step in enlarging the authority of the Interstate Commerce Commission. It upholds the power of the Commission to raise *intrastate* freight rates, not because they favor intrastate over interstate commerce, not because they fail to yield their fair share of the carriers' revenue, but because the carriers' *interstate* passenger operations are losing money.

The power of Congress to regulate *intrastate* rates stems from its authority to promote and protect interstate commerce. See *Shreveport Rate Case,* 234 U. S.

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classes of traffic are inextricably woven together, an attempt to do the impossible, namely an attempt to show costs of intrastate service segregated from interstate costs, together with similarly segregated valuation of carrier property, would serve no useful purpose." 278 I. C. C. at 66.

342.[1] By § 13 (4) of the Act, the Commission is empowered to regulate *intrastate* rates which are found to be discriminatory. The key to this regulatory authority is *discrimination against interstate commerce,* which presupposes that somehow or other the particular intrastate rates interfere with or prejudice interstate commerce. This principle is explicit in § 13 (4) [2] and in the decisions of the Court, both before and after the enactment of § 13 (4).[3]

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[1] As Mr. Justice Hughes speaking for the Court in the *Shreveport* case said (234 U. S., p. 351): "Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball,* 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile* v. *Kimball, supra*); 'to foster, protect, control and restrain' (*Second Employers' Liability Cases, supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."

[2] The relevant portions of § 13 (4) read: "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. . . ."

[3] See *Shreveport Rate Case, supra; American Express Co.* v. *South Dakota,* 244 U. S. 617; *Wisconsin Commission* v. *Chicago, B. &*

In this case there is no rational relation between *intrastate freight* rates and *interstate passenger* operations. The present level of freight rates in Florida neither hampers nor obstructs the free flow of interstate passenger transportation. They do not affect its quantity or flow. There is, therefore, no basis for a finding of discrimination against interstate commerce.

The Commission, of course, is authorized to regulate intrastate rates so that intrastate operations will provide a fair share of the carriers' revenue.[4] See *Wisconsin Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563. But that authority rests on the Commission's power to remove discrimination. If, for example, intrastate freight operations fail to produce an adequate return as determined by reference to the cost of the intrastate operations and the investment in the intrastate business, interstate commerce is discriminated against. But there is no such failure in this case. Intrastate freight operations in Florida are amply profitable and carry their fair share of the load. The Commission nevertheless has saddled the intrastate freight business with the deficits from the interstate passenger business. If there is any discrimination here, it is against the local Florida shipper.

Q. R. Co., 257 U. S. 563; *Florida* v. *United States*, 282 U. S. 194; *Georgia Commission* v. *United States*, 283 U. S. 765; *Louisiana Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125; *United States* v. *Louisiana*, 290 U. S. 70; *North Carolina* v. *United States*, 325 U. S. 507.

[4] Section 15a (2) of the Act reads in pertinent part: "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole . . . will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation . . . ."

The Commission surmises but does not find that the intrastate passenger rates contribute to the passenger deficits of the carriers. But there is no showing that either the intrastate passenger rates or the intrastate freight rates do in fact contribute to these deficits. Moreover, even if we assume that intrastate passenger rates do contribute to the passenger deficits, we do not know the amount. The absence of these material findings (see *North Carolina* v. *United States,* 325 U. S. 507) indicates to me the short cut which the Commission is taking to enlarge its jurisdiction to unprecedented limits.

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STEELE ET AL. *v.* BULOVA WATCH CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 38. Argued November 10, 1952.—Decided December 22, 1952.

Under the Lanham Trade-Mark Act of 1946, 15 U. S. C. § 1051 *et seq.*, a federal district court has jurisdiction to award relief to an American corporation against acts of trade-mark infringement and unfair competition consummated in a foreign country by a citizen and resident of the United States who purchases parts here and some of whose products, sold abroad, enter this country where they may reflect adversely on the American corporation's trade reputation. Pp. 281–289.

(a) It is not material that the infringing trade-mark was affixed in a foreign country, or that the purchase of parts in this country, when viewed in isolation, did not violate any law of the United States. P. 287.

(b) *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, distinguished. Pp. 288–289.

(c) Where there can be no interference with the sovereignty of another nation, the district court, in exercising its equity powers, may command persons properly before it to cease or perform acts outside its territorial jurisdiction. P. 289.

194 F. 2d 567, affirmed.

A Federal District Court dismissed a suit for injunctive and monetary relief brought by an American corporation against a citizen and resident of the United States for acts of trade-mark infringement and unfair competition consummated in Mexico. The Court of Appeals reversed. 194 F. 2d 567. This Court granted certiorari. 343 U. S. 962. *Affirmed,* p. 289.

Wilbur L. Matthews argued the cause and filed a brief for petitioners.

Marx Leva argued the cause for respondent. With him on the brief were *Alexander B. Hawes, A. Lloyd Symington, Sanford H. Cohen, George Cohen, Isidor Ostroff* and *Maury Maverick.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue is whether a United States District Court has jurisdiction to award relief to an American corporation against acts of trade-mark infringement and unfair competition consummated in a foreign country by a citizen and resident of the United States. Bulova Watch Company, Inc., a New York corporation, sued Steele,[1] petitioner here, in the United States District Court for the Western District of Texas. The gist of its complaint charged that "Bulova," a trade-mark properly registered under the laws of the United States, had long designated the watches produced and nationally advertised and sold by the Bulova Watch Company; and that petitioner, a United States citizen residing in San Antonio, Texas, conducted a watch business in Mexico City where, without Bulova's authorization and with the purpose of deceiving the buying public, he stamped the name "Bulova" on watches there assembled and sold. Basing its prayer on these asserted violations of the trade-mark laws of the United States,[2] Bulova requested injunctive and mone-

[1] Joined as parties defendant were S. Steele y Cia., S. A., a Mexican corporation to whose rights Steele had succeeded, and Steele's wife Sofia who possessed a community interest under Texas law.

[2] While the record shows that plaintiff fully relied on his asserted cause of action "arising under" the Lanham Act, diversity of citizenship and the jurisdictional amount were also averred. As we are concerned solely with the District Court's jurisdiction over the subject matter of this suit, we do not stop to consider the significance, if any, of those averments. Cf. *Pecheur Lozenge Co.* v. *National Candy Co.*, 315 U. S. 666 (1942), decided prior to passage of the Lanham Act. See also note 6, *infra.*

tary relief. Personally served with process in San Antonio, petitioner answered by challenging the court's jurisdiction over the subject matter of the suit and by interposing several defenses, including his due registration in Mexico of the mark "Bulova" and the pendency of Mexican legal proceedings thereon, to the merits of Bulova's claim. The trial judge, having initially reserved disposition of the jurisdictional issue until a hearing on the merits, interrupted the presentation of evidence and dismissed the complaint "with prejudice," on the ground that the court lacked jurisdiction over the cause. This decision rested on the court's findings that petitioner had committed no illegal acts within the United States.[3] With one judge dissenting, the Court of Appeals reversed; it held that the pleadings and evidence disclosed a cause of action within the reach of the Lanham Trade-Mark Act of 1946, 15 U. S. C. § 1051 *et seq.*[4] The dissenting judge thought that "since the conduct complained of substantially related solely to acts done and trade carried on under full authority of Mexican law, and were confined to and affected only that Nation's internal commerce, [the District Court] was without jurisdiction to enjoin such conduct." [5] We granted certiorari, 343 U. S. 962.

Petitioner concedes, as he must, that Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States. Cf. *Foley Bros., Inc.* v. *Filardo,* 336 U. S. 281, 284–285 (1949); *Blackmer* v. *United States,* 284 U. S. 421, 436–437 (1932); *Branch* v. *Federal Trade Commission,* 141 F. 2d 31 (1944). Resolution of the jurisdictional issue in this case therefore de-

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[3] The District Court's unreported findings of fact and conclusions of law, as amended, appear at R. 246–248. Cf. R. 232, 237.

[4] 194 F. 2d 567 (C. A. 5th Cir. 1952).

[5] *Id.,* at 573.

pends on construction of exercised congressional power, not the limitations upon that power itself. And since we do not pass on the merits of Bulova's claim, we need not now explore every facet of this complex [6] and controversial [7] Act.

The Lanham Act, on which Bulova posited its claims to relief, confers broad jurisdictional powers upon the courts of the United States. The statute's expressed intent is "to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such comme[r]ce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered

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[6] For able Court of Appeals discussions of the impact of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938) on the law prior and subsequent to the Lanham Act, see *Dad's Root Beer Co.* v. *Doc's Beverages, Inc.,* 193 F. 2d 77 (C. A. 2d Cir. 1951); *S. C. Johnson & Son* v. *Johnson,* 175 F. 2d 176 (C. A. 2d Cir. 1949); *Campbell Soup Co.* v. *Armour & Co.,* 175 F. 2d 795 (C. A. 3d Cir. 1949); *Stauffer* v. *Exley,* 184 F. 2d 962 (C. A. 9th Cir. 1950). See also *National Fruit Product Co.* v. *Dwinell-Wright Co.,* 47 F. Supp. 499 (1942). And see Zlinkoff, Erie v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition, 42 Col. L. Rev. 955 (1942); Bunn, The National Law of Unfair Competition, 62 Harv. L. Rev. 987 (1949).

[7] See, *e. g.,* Timberg, Trade-Marks, Monopoly, and the Restraints of Competition, 14 Law & Contemp. Probs. 323 (1949); cf. Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L. J. 1165 (1948). Compare, *e. g.,* Pattishall, Trade-Marks and the Monopoly Phobia, 50 Mich. L. Rev. 967 (1952); Rogers, The Lanham Act and the Social Function of Trade-Marks, 14 Law & Contemp. Probs. 173 (1949).

into between the United States and foreign nations." § 45, 15 U. S. C. § 1127. To that end, § 32 (1) holds liable in a civil action by a trade-mark registrant "[a]ny person who shall, in commerce," infringe a registered trade-mark in a manner there detailed.[8] "Commerce" is defined as "all commerce which may lawfully be regulated by Congress." § 45, 15 U. S. C. § 1127. The district courts of the United States are granted jurisdiction over all actions "arising under" the Act, § 39, 15 U. S. C. § 1121, and can award relief which may include injunctions,[9] "according to the principles of equity," to prevent the violation of any registrant's rights. § 34, 15 U. S. C. § 1116.

The record reveals the following significant facts which for purposes of a dismissal must be taken as true: Bulova Watch Company, one of the largest watch manufacturers in the world, advertised and distributed "Bulova" watches in the United States and foreign countries. Since 1929, its aural and visual advertising, in Spanish and English, has penetrated Mexico. Petitioner, long a resident of San Antonio, first entered the watch business there in 1922, and in 1926 learned of the trade-mark

[8] "Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided in this chapter, ..." 15 U. S. C. § 1114 (1).

[9] See also § 35, 15 U. S. C. § 1117 (profits, damages and costs); § 36, 15 U. S. C. § 1118 (destruction of infringing articles); § 38, 15 U. S. C. § 1120 (damages for fraudulent registration).

"Bulova." He subsequently transferred his business to Mexico City and, discovering that "Bulova" had not been registered in Mexico, in 1933 procured the Mexican registration of that mark. Assembling Swiss watch movements and dials and cases imported from that country and the United States, petitioner in Mexico City stamped his watches with "Bulova" and sold them as such. As a result of the distribution of spurious "Bulovas," Bulova Watch Company's Texas sales representative received numerous complaints from retail jewelers in the Mexican border area whose customers brought in for repair defective "Bulovas" which upon inspection often turned out not to be products of that company. Moreover, subsequent to our grant of certiorari in this case the prolonged litigation in the courts of Mexico has come to an end. On October 6, 1952, the Supreme Court of Mexico rendered a judgment upholding an administrative ruling which had nullified petitioner's Mexican registration of "Bulova." [10]

On the facts in the record we agree with the Court of Appeals that petitioner's activities, when viewed as a whole, fall within the jurisdictional scope of the Lanham Act. This Court has often stated that the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears. *E. g., Blackmer* v. *United States,* 284 U. S. 421, 437 (1932); *Foley Bros., Inc.* v. *Filardo,* 336 U. S. 281, 285 (1949). The question thus is "whether Congress intended to make the law applicable" to the facts of this case. *Ibid.* For "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when

[10] *Sidney Steele* v. *Secretary of the National Economy,* decided by the Second Court of the Supreme Court of Mexico. That decision is reprinted, as translated, as Appendix III to respondent's brief.

the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government." *Skiriotes* v. *Florida,* 313 U. S. 69, 73 (1941).[11] As Mr. Justice Minton, then sitting on the Court of Appeals, applied the principle in a case involving unfair methods of competition: "Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States." *Branch* v. *Federal Trade Commission,* 141 F. 2d 31, 35 (1944). Nor has this Court in tracing the commerce scope of statutes differentiated between enforcement of legislative policy by the Government itself or by private litigants proceeding under a statutory right. *Thomsen* v. *Cayser,* 243 U. S. 66 (1917); *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219 (1948); cf. *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377 (1948); *Foley Bros., Inc.* v. *Filardo, supra.* The public policy subserved is the same in each case. In the light of the broad jurisdictional grant in the Lanham Act, we deem its scope to encompass petitioner's activities here. His operations and their effects were not confined within the territorial limits of a foreign nation. He bought component parts of his wares in the United States, and spurious "Bulovas" filtered through the Mexican border into this country; his competing goods could well reflect adversely on Bulova Watch Company's trade reputation in markets cultivated by advertising here as well as abroad. Under similar factual circumstances, courts of the United States have awarded relief to registered trade-

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[11] See, *e. g.,* 1 Oppenheim, International Law (6th ed., Lauterpacht, 1947), § 145, p. 297.

mark owners, even prior to the advent of the broadened commerce provisions of the Lanham Act.[12] *George W. Luft Co.* v. *Zande Cosmetic Co.*, 142 F. 2d 536 (1944); *Hecker H-O Co.* v. *Holland Food Corp.*, 36 F. 2d 767 (1929); *Vacuum Oil Co.* v. *Eagle Oil Co.*, 154 F. 867 (1907), aff'd, 162 F. 671 (1908). Cf. *Morris* v. *Altstedter*, 93 Misc. 329, 156 N. Y. S. 1103, aff'd, 173 App. Div. 932, 158 N. Y. S. 1123 (1916). Even when most jealously read, that Act's sweeping reach into "all commerce which may lawfully be regulated by Congress" does not constrict prior law or deprive courts of jurisdiction previously exercised. We do not deem material that petitioner affixed the mark "Bulova" in Mexico City rather than here,[13] or that his purchases in the United States when viewed in isolation do not violate any of our laws. They were essential steps in the course of business consummated abroad; acts in themselves legal lose that character when they become part of an unlawful scheme. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 720 (1944); *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254 (1942). "[I]n such a case it is not material that the source of the forbidden effects upon . . . commerce arises in one phase or another of that program." *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 237 (1948). Cf. *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 297–298 (1945). In sum, we do not think that petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders.

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[12] Cf. 15 U. S. C. §§ 96, 124, requiring the infringing use to be "in commerce among the several States, or with a foreign nation." *United States Printing & Lithograph Co.* v. *Griggs, Cooper & Co.*, 279 U. S. 156 (1929); *Pure Oil Co.* v. *Puritan Oil Co.*, 127 F. 2d 6 (1942).

[13] See *Vacuum Oil Co.* v. *Eagle Oil Co.*, 154 F. 867 (1907).

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347 (1909), compels nothing to the contrary. This Court there upheld a Court of Appeals' affirmance of the trial court's dismissal of a private damage action predicated on alleged violations of the Sherman Act.[14] The complaint, in substance, charged United Fruit Company with monopolization of the banana import trade between Central America and the United States, and with the instigation of Costa Rican governmental authorities to seize plaintiff's plantation and produce in Panama. The Court of Appeals reasoned that plaintiff had shown no damage from the asserted monopoly and could not found liability on the seizure, a sovereign act of another nation.[15] This Court agreed that a violation of American laws could not be grounded on a foreign nation's sovereign acts. Viewed in its context, the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive; this Court held as much in *Thomsen* v. *Cayser*, 243 U. S. 66 (1917), and *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927).[16] As in *Sisal*, the crux of the complaint here is "not merely of something done by another government at the instigation of private parties;" petitioner by his "own deliberate acts, here and elsewhere, . . . brought about forbidden results within the United States." 274 U. S., at 276. And, unlike the

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[14] 166 F. 261 (C. A. 2d Cir. 1908), affirming 160 F. 184.

[15] 166 F., at 264, 266.

[16] See also *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443–444 (1945). Cf. *Ford* v. *United States*, 273 U. S. 593, 620–621 (1927); *Lamar* v. *United States*, 240 U. S. 60, 65–66 (1916); *Strassheim* v. *Daily*, 221 U. S. 280, 284–285 (1911).

Banana case, whatever rights Mexico once conferred on petitioner its courts now have decided to take away.

Nor do we doubt the District Court's jurisdiction to award appropriate injunctive relief if warranted by the facts after trial. 15 U. S. C. §§ 1116, 1121. Mexico's courts have nullified the Mexican registration of "Bulova"; there is thus no conflict which might afford petitioner a pretext that such relief would impugn foreign law. The question, therefore, whether a valid foreign registration would affect either the power to enjoin or the propriety of its exercise is not before us. Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction. *New Jersey* v. *New York*, 283 U. S. 473 (1931); *Massie* v. *Watts*, 6 Cranch 148 (1810); *The Salton Sea Cases*, 172 F. 792 (1909); cf. *United States* v. *National Lead Co.*, 332 U. S. 319, 351–352, 363 (1947).[17]

Affirmed.

MR. JUSTICE BLACK took no part in the decision of this case.

MR. JUSTICE REED, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The purpose of the Lanham Act is to prevent deceptive and misleading use of trade-marks. § 45, 15 U. S. C. § 1127. To further that purpose the Act makes liable

[17] Cf. *Cole* v. *Cunningham*, 133 U. S. 107, 117–119 (1890); *Phelps* v. *McDonald*, 99 U. S. 298, 307–308 (1879); *Securities and Exchange Commission* v. *Minas de Artemisa, S. A.*, 150 F. 2d 215 (1945); Restatement, Conflict of Laws, §§ 94, 96. And see *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All Eng. 780, 782 (C. A.).

in an action by the registered holder of the trade-mark "any person who shall, in commerce," infringe such trademark. § 32 (1), 15 U. S. C. § 1114. "Commerce" is defined as being "all commerce which may lawfully be regulated by Congress." § 45, 15 U. S. C. § 1127.

The Court's opinion bases jurisdiction on the Lanham Act. In the instant case the only alleged acts of infringement occurred in Mexico. The acts complained of were the stamping of the name "Bulova" on watches and the subsequent sale of the watches. There were purchases of assembly material in this country by petitioners. Purchasers from petitioners in Mexico brought the assembled watches into the United States. Assuming that Congress has the power to control acts of our citizens throughout the world, the question presented is one of statutory construction: Whether Congress intended the Act to apply to the conduct here exposed.

"The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, *Blackmer* v. *United States,* [284 U. S. 421], 437, is a valid approach whereby unexpressed congressional intent may be ascertained." *Foley Bros., Inc.* v. *Filardo,* 336 U. S. 281, 285. Utilizing this approach, does such a contrary intent appear in the Lanham Act? If it does, it appears only in broad and general terms, *i. e.,* "to regulate commerce within the control of Congress . . . ." § 45, 15 U. S. C. § 1127. Language of such nonexplicit scope was considered by the Court in construing the Sherman Act in *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357. "Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch." The *American*

Banana Co. case confined the Sherman Act in its "operation and effect to the territorial limits over which the lawmaker has general and legitimate power." 213 U. S., at 357. This was held to be true as to acts outside the United States, although the parties were all corporate citizens of the United States subject to process of the federal courts.

The generally phrased congressional intent in the Lanham Act is to be compared with the language of the Fair Labor Standards Act which we construed in *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377. There we held that by explicitly stating that the Act covered "possessions" of the United States, Congress had intended that the Act was to be in effect in all "possessions" and was not to be applied merely in those areas under the territorial jurisdiction or sovereignty of the United States.

There are, of course, cases in which a statement of specific contrary intent will not be deemed so necessary. Where the case involves the construction of a criminal statute "enacted because of the right of the Government to defend itself against obstruction, or fraud . . . committed by its own citizens," it is not necessary for Congress to make specific provisions that the law "shall include the high seas and foreign countries." *United States* v. *Bowman,* 260 U. S. 94, 98. This is also true when it is a question of the sovereign power of the United States to require the response of a nonresident citizen. *Blackmer* v. *United States,* 284 U. S. 421. A similar situation is met where a statute is applied to acts committed by citizens in areas subject to the laws of no sovereign. See *Skiriotes* v. *Florida,* 313 U. S. 69; *Old Dominion S. S. Co.* v. *Gilmore,* 207 U. S. 398.

In the instant case none of these exceptional considerations come into play. Petitioner's buying of unfinished watches in the United States is not an illegal commercial act. Nor can it be said that petitioners were engaging

in illegal acts in commerce when the finished watches bearing the Mexican trade-mark were purchased from them and brought into the United States by such purchasers, all without collusion between petitioner and the purchaser. The stamping of the Bulova trade-mark, done in Mexico, is not an act "within the control of Congress." It should not be utilized as a basis for action against petitioner. The Lanham Act, like the Sherman Act, should be construed to apply only to acts done within the sovereignty of the United States. While we do not condone the piratic use of trade-marks, neither do we believe that Congress intended to make such use actionable irrespective of the place it occurred. Such extensions of power bring our legislation into conflict with the laws and practices of other nations, fully capable of punishing infractions of their own laws, and should require specific words to reach acts done within the territorial limits of other sovereignties.

Syllabus.

CITY OF NEW YORK *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 203. Argued December 19, 1952.—Decided January 12, 1953.

In a railroad reorganization under § 77 of the Bankruptcy Act, the court ordered "creditors" to file their claims by a certain date or be denied participation except for cause shown. Creditors other than mortgage trustees and those who had appeared in court were notified by publication only. A city which received no copy of the order did not file claims for its local-improvement liens on specific parcels of the railroad's real estate. *Held:* A final decree providing for transfer of the railroad's properties to a newly organized company could not validly destroy or bar enforcement of the city's liens. Pp. 294–297.

1. The city was a "creditor" within the meaning of § 77 (b) of the Bankruptcy Act. Pp. 295–296.

2. In the circumstances of this case, publication did not constitute the "reasonable notice" to the city required by § 77 (c) (8). P. 296.

3. The bar order against the city cannot be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. P. 297.

197 F. 2d 428, reversed.

The District Court enjoined enforcement of a city's liens for local improvements on specific real estate of a railroad which had since been reorganized under the Bankruptcy Act. 105 F. Supp. 413. The Court of Appeals affirmed. 197 F. 2d 428. This Court granted certiorari. 344 U. S. 809. *Reversed,* p. 297.

Meyer Scheps and *Seymour B. Quel* argued the cause for petitioner. With them on the brief were *Denis M. Hurley, Harry E. O'Donnell* and *Anthony Curreri.*

Edward R. Brumley argued the cause for respondent. With him on the brief was *Robert M. Peet.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented is whether under the circumstances of this case reorganization of the respondent railroad under § 77 of the Bankruptcy Act[1] destroyed and barred enforcement of liens which New York City had imposed on specific parcels of the railroad's real estate for street, sewer and other improvements. The improvements were made and the liens were all laid prior to 1931. Reorganization was begun in the District Court in 1935. Subsequently, acting pursuant to subdivision (c)(7) of § 77 the court issued an order directing "creditors" to file their claims by a prescribed date, after which unfiled claims would be denied participation except for "cause shown." The railroad was required to mail copies of the order to mortgage trustees or their counsel and to all creditors who had already appeared in court. Other creditors had to depend for their notice on two once-a-week publications of the order in five daily newspapers, one of which was the Wall Street Journal.[2] New York thus received no copy of the bar order. Its lien claims were never filed.

The court's final decree provided for transfer of the old railroad's properties to the newly organized company free from the city's liens.[3] Jurisdiction was reserved to consider and act on future applications for instructions concerning disputes over interpretation and execution of the decree. Pursuant to this reservation the railroad brought the present action alleging that the city in failing to file had forfeited its claims; the railroad prayed for a declaration that the liens were forever barred, void and unen-

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[1] 47 Stat. 1474, as amended, 49 Stat. 911, 11 U. S. C. § 205.

[2] The other newspapers were located in Connecticut, Massachusetts and Rhode Island.

[3] The city has contended strongly that the decree should not be so construed, but we find it unnecessary to discuss this question.

forcible, and that the real property was discharged and released therefrom. The District Court agreed with the railroad and enjoined enforcement of the liens. 105 F. Supp. 413. The Court of Appeals affirmed, Judge Frank dissenting. 197 F. 2d 428. In both courts the city made several arguments only two of which we need consider here: (1) Since the lien claims were collectible only out of specified parcels of real estate, the city was not a "creditor" of the railroad and consequently was not required to file its claims in bankruptcy court; (2) in the absence of actual service of notice on the city, the court was without power to forfeit its liens because of its failure to appear as a claimant. To consider these questions we granted certiorari. 344 U. S. 809.

(1) We reject the city's contention that it was not a creditor within the meaning of § 77 of the Bankruptcy Act. Section 77 (b) defines "creditors" as ". . . all holders of claims of whatever character against the debtor or its property . . ." and specifically defines "liens" as "claims." [4] We had reason to comment recently on the broad coverage of this section in *Gardner* v. *New Jersey*, 329 U. S. 565, where we held that state tax liens made states "creditors" for purposes of § 77. True, the state's liens there were general charges against all railroad assets while the liens here are not. New York can look only to each parcel of property on which its liens are laid. But the reasons for our *Gardner* holding are equally ap-

[4] ". . . The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this title, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U. S. C. § 205 (b).

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plicable here. New York is a "creditor" in the statutory sense and consequently was required to file its claims in bankruptcy unless freed from that duty by lack of adequate notice.

(2) Section 77 (c)(8) of the Act states that "The judge shall cause reasonable notice of the period in which claims may be filed, . . . by publication or otherwise." 11 U. S. C. § 205 (c)(8). We hold that publication of the bar order in newspapers cannot be considered "reasonable notice" to New York under the circumstances of this case.

Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication. See, *e. g.*, *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from "constructive notice" by newspaper. In the first place subdivision (c)(4) of § 77 is designed to enable the court to serve personal notices on creditors. It provides that "The judge shall require . . ." proper persons to file in the court a list of all known creditors, the amount and character of their claims and their last known post-office addresses. This was not done here. Had the judge complied with the statute's mandate, it is likely that notice would have been mailed to New York City. Moreover, the railroad and the bankruptcy trustees knew about New York's asserted liens. And there was at least as much reason to serve a mail notice on New York City as on representatives of the railroad's mortgagees. Their liens were subordinate to New York's. There was even more reason to mail notice to the non-appearing known creditor New York City than to the creditors who had actually filed appearances as claimants.

Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.

The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON doubt that a city whose only claim is *in rem* and which has no standing to participate in the general estate is a creditor in the sense of § 77 (b). But whether New York is or is not such a creditor, they agree with the opinion that the notice in this case is not adequate support for an order destroying the liens.

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL. *v.* UNITED STATES ET AL.

NO. 26. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.*

Argued November 17–18, 1952.—Decided January 12, 1953.

Under the Motor Carrier Act, 1935, as amended, the Interstate Commerce Commission promulgated rules governing the use by authorized motor carriers of equipment not owned by them but leased from the owners or obtained by interchange with other authorized motor carriers. These rules abolish trip-leasing and revenue-splitting with driver-owners; require written contracts, carrier inspection, control and responsibility for nonowned equipment; and, for interchanged equipment, require drivers employed by the certified carrier over whose route it travels. *Held:*

1. The promulgation of these rules for authorized carriers is within the Commission's power, despite the absence of specific reference to leasing practices in the Act. Pp. 308–313.

2. The rules do not violate the National Transportation Policy. Pp. 313–314.

3. The rules and the exemptions therefrom are not unreasonable. Pp. 314–316.

4. The rules do not violate § 208 (a) or § 209 (b), protecting the carriers' right to augment their equipment. Pp. 316–317.

5. They do not violate § 203 (b) (6), which exempts from the Commission's jurisdiction vehicles used in carrying only livestock, fish or agricultural commodities—though they may increase the cost of operating such vehicles. Pp. 317–318.

6. Nor were the rules the product of proceedings fatally at variance with requirements of the Administrative Procedure Act. Pp. 318–320.

(a) Section 7 (c) of the Administrative Procedure Act, providing that the proponent of a rule "shall have the burden of proof," is inapplicable; since these rules were promulgated under

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*Together with No. 35, *Eastern Motor Express, Inc. et al.* v. *United States et al.*, and No. 36, *Secretary of Agriculture* v. *United States et al.*, on appeals from the United States District Court for the Southern District of Indiana.

§ 204 (a) (6) of the Motor Carrier Act, which requires no record or hearing. Pp. 318–320.

(b) Similarly inapplicable is § 8 (b) of the Administrative Procedure Act, which requires that decisions shall include a statement of "findings and conclusions." P. 320.

7. In a carrier's suit to enjoin enforcement of these rules, the District Court did not err in refusing to permit introduction of evidence of "confiscation," though the rules may affect the value of some going concerns. Pp. 320–323.

101 F. Supp. 710 and 103 F. Supp. 694, affirmed.

Two federal district courts declined to enjoin enforcement of rules promulgated by the Interstate Commerce Commission governing the use by motor carriers of equipment not owned by them. 101 F. Supp. 710; 103 F. Supp. 694. On appeal to this Court, *affirmed,* p. 323.

Harry E. Boot and *Wilbur M. Brucker* argued the cause for appellants in No. 26. On the brief were *Mr. Boot* and *Peter T. Beardsley* for the American Trucking Associations, Inc., *George S. Dixon* for the National Automobile Transporters Association et al., *Herbert Baker* and *Noel F. George* for the Association of Highway Steel Transporters, Inc., *Joseph H. Blackshear* for the Watkins Motor Lines, Inc. et al., *James W. Wrape* for the Gordons Transports, Inc. et al., and *John S. Burchmore* for the National Industrial Traffic League, appellants.

Howell Ellis argued the cause for appellants in No. 35. With him on the brief was *Milton E. Diehl.* With them on the Statement as to Jurisdiction was *John S. Burchmore.*

Neil Brooks argued the cause for appellant in No. 36. With him on the brief was *W. Carroll Hunter.*

Ralph S. Spritzer argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp* and *Edward M.*

Reidy. *Philip B. Perlman,* then Solicitor General, *Daniel W. Knowlton* and *Mr. Reidy* filed motions to dismiss for the United States and the Interstate Commerce Commission in Nos. 26 and 35.

Burton K. Wheeler argued the cause for the Brotherhood of Teamsters-Chauffeurs-Warehousemen & Helpers of America, appellee. With him on the brief were *Edward K. Wheeler, Robert G. Seaks* and *J. Albert Woll.*

Carl Helmetag, Jr. argued the cause for the Intervening Railroads, appellees. With him on the brief were *Charles Clark* and *Joseph F. Hays.* With them on a motion to affirm were *Frank W. Gwathmey* and *Joseph F. Johnson* in No. 26.

Franklin R. Overmyer argued the cause and filed a brief for the Chicago Suburban Motor Carriers Association et al., appellees.

Robert N. Burchmore, Nuel D. Belnap and *John S. Burchmore* filed a brief for the National Industrial Traffic League, appellant in Nos. 26 and 35.

Briefs of *amici curiae* supporting appellants were filed by *Edward R. Adams, Drew L. Carraway* and *Homer S. Carpenter* for the Greyvan Lines, Inc.; and by *Mr. Brucker* and *Harold J. Waples* for the Movers Conference of America.

Smith Troy, Attorney General, filed a brief for the State of Washington, as *amicus curiae,* urging affirmance.

Mr. Justice Reed delivered the opinion of the Court.

These appeals attack new Interstate Commerce Commission rules governing the use of equipment by authorized motor carriers when the equipment is not owned by the carrier but is leased from the owner or obtained by interchange with another authorized carrier. They

were prescribed by the Commission and reported *Ex Parte No. MC–43, Lease and Interchange of Vehicles by Motor Carriers,* 52 M. C. C. 675. As will be seen from the portions we have quoted in the Appendix, *post,* p. 323, they principally require carrier inspection; when the equipment is leased, control for a minimum of thirty days and a method of compensation other than division of revenues between lessor and lessee; and, in the case of use of another carrier's equipment, authorization to the exchange point and actual transfer of control. Thus the practice of using leased equipment and that obtained by interchange is brought into conformity with the regulation of carrier-owned equipment to avoid evils that had grown up in that practice.

Some six suits were instituted to test the validity of the rules in the district courts under 28 U. S. C. §§ 2321–2325. Three were stayed by orders and one was not moved pending disposition of the instant cases.[1] These came here on direct appeal from two separate judgments denying the injunctive relief prayed for; one in the Southern District of Indiana, *Eastern Motor Express, Inc.* v. *United States,* 103 F. Supp. 694, and the other in the Northern District of Alabama, *American Trucking Associations, Inc.* v. *United States,* 101 F. Supp. 710. The issues there considered and resolved against the applicants concerned the Commission's authority under the Motor Carrier Act of 1935, Interstate Commerce Act, Part II, 49 Stat. 543, as amended, 54 Stat. 919, 49 U. S. C. § 301 *et seq.;* the impact of the rules on agricultural trucking and on the guaranteed right of authorized carriers to augment their equipment; the application of the

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[1] *Oklahoma-Louisiana Motor Freight Corp.* v. *United States* (D. C. W. D. Okla.); *Movers' Conference of America* v. *United States* (D. C. E. D. Mich.); *Greyvan Lines, Inc.* v. *United States* (D. C. N. D. Ill.), and *Apger* v. *United States* (D. C. N. D. Ohio), respectively.

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.;* and the right of the protestants to introduce additional evidence in the district courts. Since there were only minor differences in the content of the two cases appealed, they may be treated together.

I. *Introduction.*—We consider at the outset the existing conditions of the motor truck industry and its regulation as developed during the Commission's hearings because only against such a background are the rules meaningful. Commission authorization in the form of permits or certificates of convenience and necessity is a precondition to interstate service by virtue of the Motor Carrier Act. Such authorization, except under the "grandfather" clause, is granted only after a showing of fitness and ability to perform and a public need for the proffered service. And it specifically limits the scope and business of the permitted operations in the case of a contract carrier, and the routes and termini which may be served by a certificated common carrier.[2]

The Act waives these conditions of agency authorization and service limitations for a sizable portion of the industry, however. Most important of the exempt operations are those involving equipment used in the transportation of agricultural products. By and large, the equipment in this category is owned and operated by the same person. It falls only within the Commission's jurisdiction over drivers' qualifications, hours of service and safety.[3] And so there is no mandate on these exempt owner-operators to provide adequate and nondiscrimina-

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[2] Interstate Commerce Act, §§ 206–209, 49 Stat. 551–553.

[3] The Commission's safety regulations are published at 49 CFR, Parts 190–196. Section 203 (b) also exempts (1) school transportation, (2) taxicabs, (3) hotel service, (4) national park transportation, (4a) farmers, (5) cooperatives, (7) newspapers, (7a) airlines, (8) local service, and (9) "casual" transportation.

tory service, adhere to published rates, and comply with the strict insurance requirements imposed on carriers authorized for general carriage.[4]

Because of the limiting character of the regulatory system, authorized carriers have developed a wide practice of using nonowned equipment. They have moved in two directions. The first is interchange. This includes those arrangements whereby two or more certificated carriers provide for through travel of a load in order to merge the advantages of certification to serve different areas. In this fashion, a wholly or partially loaded trailer may be exchanged at the established interchange point, or even an entire truck travel the line without interruption, under the guise of a shift in control. The second is leasing. This relates to the use of exempt equipment in authorized operations. Carriers subject to Commission jurisdiction have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands. By a variety of arrangements, the authorized carriers hire them to conduct operations under the former's permit or certificate. Such operators thus travel approved routes with nonexempt property, and in the great majority of instances sever connections with their lessee carrier at the end of the trip.[5]

The use of nonowned equipment by authorized carriers is not illegal, either under the Act or the rules under

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[4] See Interstate Commerce Act, §§ 209 (b), 216 (e), 217 (b), 49 Stat. 553, 558, 561, and 49 CFR, Part 174.

[5] It apparently is difficult to generalize about the economic significance of leasing and interchange. A survey made by the Bureau in 1947 disclosed only that about two-thirds of the carriers did not lease. The desirability to each carrier would be affected by many variables, of course, including the number of trucks he owned, the volume and stability of local demand and the extent of his carrying authority.

consideration.[6] But evidence is overwhelming that a number of satellite practices directly affect the regulatory scheme of the Act, the public interest in necessary service and the economic stability of the industry, and it is on these that the rules focus. It appears, for instance, that while many arrangements are reduced to writing, oral leases are common; some were concluded after the trips were made and in several cases exempt operators solicited business themselves with blank authorized carrier forms or other evidence of agency. It is strongly urged that this very informality of the contractual relationship between carrier and exempt operator creates conditions in the industry inconsistent with those which the Act contemplates. Proof was proffered during the proceedings that the informal and tenuous relationships in lease and interchange permit evasions of the limitations on certificated or permitted authority. Since the driver of the exempt equipment is not an employee of the carrier, sanctions for violation of geographical restrictions are clearly difficult to impose, especially in the case of the single-trip lessor. Interchange may, as well, become a device to circumvent geographical restrictions in the certificate. The practice of authorized carriers conducting operations beyond the territory they are entitled to serve under cover of a lease from the local carrier was clearly shown in the evidence before the Commission. It appeared, in fact, that some of these operations are entirely fictional, being created *ad hoc* after the trip is made—and this at times in the wake of a specific denial by the Commission of an application to serve the area.

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[6] It appears, however, that a number of states control the practice already. Washington, which has filed an intervenor brief here urging affirmance, is notable in limiting trip leases, and in requiring that the driver be an employee of the carrier and that the latter control the vehicle. The relevant provision is cited to us as "Leasing Rule 40" by the Brief of the Attorney General of that State.

It was also alleged, and shown by evidence of some incidents, that the Commission's safety requirements were not observed by exempt lessors. Because of the fact that the great bulk of the arrangements cover only one trip, leasing carriers have little opportunity or desire to inspect the equipment used, especially in cases where the agreement is made without the operator's appearance at the carrier's terminal. Enforcement sanctions by the carriers for violations would be clearly as difficult to impose as route standards. Hence, the carrier may not extend the supervision of rest periods, doctors' certificates, brakes, lights, tires, steering equipment and loading, normally accorded his own employees and vehicles, to equipment and drivers secured through lease. And the owner-operator himself is called upon to push himself and his truck because of the economic impact of time spent off the road and investment in repairs on his slim profit margin.[7] Further, the absence of written agreements has made the fixing of the lessee's responsibility for accidents highly difficult.

Consequences on the economic stability of the industry were also noted. The carrier engaged in leasing practice is at the mercy of the cost and supply of exempt equipment available to him. Hence, he may at times find himself unable to undertake shipping obligations because no trucks are available willing to make a relatively unprofitable trip or to assume the burdens of less-than-carload service. Certification is granted on a showing that a concern is fit and willing to provide nondiscriminatory service required by the public convenience. To sustain this obligation, the authorized integrated carrier who finds his

[7] The conclusion that highway safety may be impaired rests admittedly on informed speculation rather than statistical certainty. A road check examination conducted by the Bureau did not indicate any significant difference in the number of safety violations between leased and owned vehicles.

leasing competitor only willing to undertake the more profitable ventures may be obliged to rely on miscellaneous freight without compensating economic long carload hauls to sustain estimated profit margins.

Use of exempt equipment by authorized carriers also tends to obstruct normal rate regulation. Schedules are traditionally grounded in costs. But the cost picture of a carrier who depends largely on leased equipment is far different from that of a carrier owning his own trucks. Not only is the former able to undertake operations with relatively slight investment. As well, his current overhead involved in operating leased equipment is solely administrative, the owner of the exempt equipment bearing the expense of gas, oil, tires, wages and depreciation out of his share of the fee. And to refer to the exempt owner's own expenses as determinative of what is a "reasonable" rate would be manifestly impossible as long as the relationships between lessor and lessee are too tenuous, short-termed and informal and the compensation of each based on a division of revenue.

It is claimed that the practice in fact has had a demoralizing effect on the industry. Authorized carriers find it advantageous to expand their operations by leased equipment because of the fact that no investment is required, nor is the risk of empty return trips and other overhead incurred. Hence, carriers owning their own trucks face a fluid rate structure in competition with those specializing in use of exempt equipment, especially where such equipment is offered for a trip, as it often is, for expenses. There is thus a pressure on the certificated operator to enter the leasing field and hence expand the effect of these conditions and practices on efficient, safe and nondiscriminatory truck service which the Act is designed to promote.

II. *Commission Proceedings.*—All before us admit the difficulties which have developed. In fact, the Commission has considered them for some years. As early as

1940, following complaints, the Bureau of Motor Carriers held hearings on the subject which culminated in a statistical report in 1943. The necessity of maximum use of transportation resources during the war postponed any action thereafter until 1947.[8] In that year, however, the Director of the Bureau reinstituted discussion, had suggested regulations drafted, and drew on his field staff for reports of the use of the exempt vehicles by authorized carriers. The present proceedings were instituted by the Commission on January 9, 1948, when it became apparent that carrier agreement regarding a proper solution was unlikely. Its order, published at 13 Fed. Reg. 369, declared all authorized carriers respondents and set forth the practices to be investigated, four possible schemes of regulation, and suggested rules. A qualified examiner thereafter heard some 80 witnesses in Washington and St. Louis, and issued a report and proposed rules. A full report by the Commission's Division 5 followed on June 26, 1950, confirming the examiner's findings and amending his proposals,[9] and, following petitions for reconsideration, the entire Commission reopened proceedings for oral argument. The Commission's report, dated May 8, 1951, in effect adopted the examiner's proposed rules, after affirming and reiterating the nature and effect of

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[8] See General Order O. D. T. 3, Revised, §§ 501.5 (d), 501.9, 501.10, 501.13, July 14, 1942, 7 Fed. Reg. 5445 *et seq.*, requiring full leasing, interchange and division of revenues; I. C. C. Emergency Order No. M–1, June 11, 1942, §§ 215.101, 215.105, 7 Fed. Reg. 4429; and I. C. C. Emergency Order M–6, November 1, 1945, § 176.10 (a), 10 Fed. Reg. 13595.

[9] *Ex Parte No. MC–43, Lease and Interchange of Vehicles by Motor Carriers*, 51 M. C. C. 461.

The change went to the heart of the problem. The examiner had suggested a requirement that the rental be of at least 30 days' duration and that compensation be on a basis other than a division of revenues. Division 5 rejected both provisions, recognizing that they would in effect abolish trip-leasing.

leasing and interchange practices on the industry and regulation under the Act.

III. *The Rules.*—In this final form, the rules establish as conditions to the use of nonowned equipment by authorized carriers the reduction of the contracts to writing. Rule § 207.4 (a)(2), 52 M. C. C. 744. It is required that such contracts vest exclusive possession of, and responsibility for, the equipment in the authorized carrier during the rental, Rule § 207.4 (a)(4), the life of which must exceed thirty days when the driver is the owner or his employee. Rule § 207.4 (a)(3). Finally, the contract must fix the compensation of the lessor, which may not be measured by a percentage of the gross revenue. Rule § 207.4 (a)(5). Interchange agreements between two authorized carriers must also be in writing and the equipment must be driven by an employee of the certificated carrier over whose authorized route it travels. Rule § 207.5 (a), (c).

The rules also require inspection of nonowned equipment when the lessee carrier takes possession, Rule § 207.4 (c), as well as the identification of the trucks as within its responsibility, Rule § 207.4 (d), and the testing of the driver's familiarity with Motor Carrier Safety Regulations. Rule § 207.4 (e). Records of the use of rented and interchanged equipment are mandatory. Rule § 207.4 (f).

IV. *Commission Authority.*—Appellants focus their principal attack on the lease provisions requiring a thirty-day period of carrier control and a measure of compensation other than revenue splitting. All agree that the rules thus abolish trip-leasing. Unfortunate consequences are predicted for the public interest because the exempt owner-operator will no longer be able to hire himself out at will—in sum, that the industry's ability to serve a fluctuating demand will suffer and transportation costs accordingly go up. It is the Commission's position that

the industry and the public will benefit directly because of the stabilization of conditions of competition and rate schedules, and that in fact the continued effectiveness of the Commission's functions under the Motor Carrier Act is dependent on regulation of leasing and interchange. Needless to say, we are ill equipped to weigh such predictions of the economic future. Nor is it our function to act as a super-commission. So we turn to the legal considerations so strongly urged on us.

Here, appellants have framed their position as a broadside attack on the Commission's asserted power. All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or affect leasing practices,[10] and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include spe-

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[10] The Act as originally drafted included, as a definition of carriers, all engaged in transportation "whether directly or by a lease." § 203 (a)(14), (15), 49 Stat. 544, 545. The "added language [was] intended to check evasion of the act by bringing within its terms such transportation operations as are performed through the leasing of motor vehicles or other similar arrangements which may constitute either common or contract carriage, according to the particular nature of the arrangements. The language inserted will enable the Commission to strike through such evasions where the facts warrant it." 79 Cong. Rec. 5651. The terminology was stricken by the Transportation Act of 1940, 54 Stat. 898, 920, which, however, introduced no qualification and which, as we have indicated, was merely "[f]or purposes of clarity." *Thomson* v. *United States*, 321 U. S. 19, 23. See 86 Cong. Rec. 11546.

cific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 219–220; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 193–194. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612.

Moreover, we must reject at the outset any conclusion that the rules as a whole represent an attempt by the Commission to expand its power arbitrarily; there is clear and adequate evidence of evils attendant on trip-leasing. The purpose of the rules is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system. Sections 216 (b) and 218 (a) of the Act, for instance, require the filing of a just and reasonable rate schedule by each common carrier, and the violation of these rates and the demoralization of rate structures generally are a probable concomitant of current leasing practices. Section 204 (a)(2) requires the Commission to impose rules relating to safety of operation for vehicles and drivers. These are likewise threatened by the unrestricted use of nonowned equipment by the common carriers. And the requirements of continuous service in § 204 (a)(1), of observance of authorized routes and termini under §§ 208 (a) and 209 (b), and the prohibitions of rebates, §§ 216 (d), 217 (b), 218 (a) and 222 (c), also may be ignored through the very practices here proscribed.

So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress. Included in the Act as a duty of the Commission is that "[t]o administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." § 204 (a)(6). And this necessary rule-making power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation," regulation of which is vested in the Commission by § 202 (a). See also § 203 (a)(19).

We cannot agree with appellants' contention that the rule-making authority of § 204 (a)(6) merely concerns agency procedures and is solely administrative. It ignores the distinct reference in the section to enforcement. Furthermore, the power of the Commission to make rules applicable to transfers of certificates or permits is recognized by § 212 (b). That section permits transfers "pursuant to such rules and regulations as the Commission may prescribe." It does not strain logic or experience to look upon leasing of exempt equipment and interchange as a transfer, temporary in nature, of the carrier's authorized right to serve his specified area; in fact we think this interpretation is dramatically supported here by the evidence that owner-operators themselves take the initiative in securing cargoes, while the carriers accept only the administrative function of approving the use of the nonowned equipment over their authorized routes and under their names. It is an unnatural construction of the Act which would require the Commission to sit idly by and wink at practices that lead to violations of its provisions.

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We hold then that the promulgation of these rules for authorized carriers falls within the Commission's power, despite the absence of specific reference to leasing practices in the Act. See *General Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, 432. The grant of general rule-making power necessary for enforcement compels this result. It is foreshadowed, of course, by *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612. That case validated an order requiring railroads to lease cars to a competing carrier by sea, in spite of the inability of the Commission to ground its action on some specific provision of the Act. 323 U. S., at 616. This Court pointed to the fact that the "unquestioned power of the Commission to require establishment of [through] routes would be wholly fruitless, without the correlative power to abrogate the Association's rule which prohibits the interchange." 323 U. S., at 619. There is evidence here that convinces us that that regulation of leasing practices is likewise a necessary power; in fact, we think its exercise more crucial than in *United States* v. *Pennsylvania R. Co.* The enforcement of only one phase of the Act was there endangered; here, practically the entire regulatory scheme is affected by trip-leasing.

A fair analogy appears between the conditions which brought about the Motor Carrier Act and those sought to be corrected by the present rules, confirming our view of the Commission's jurisdiction. Then the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility.[11] So Congress felt

[11] Regulation of Transportation Agencies, S. Doc. No. 152, 73d Cong., 2d Sess. 14–15, 22–35, 226; 79 Cong. Rec. 12196, 12209; Hearings, Senate Committee on Interstate Commerce, on S. 1629, S. 1632, and S. 1635, 74th Cong., 1st Sess., Part I, 78–80, 404–405, 410–411.

compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition, while at the same time protecting existing routes through the "grandfather" clause.[12] The Commission's rule-making here considered is based on conditions that similarly threaten, though perhaps to a lesser degree, the efficient operation of the industry today.

And as exercised, the power under § 204 (a)(6) is geared to and bounded by the limits of the regulatory system of the Act which it supplements. It is thus as clearly defined for constitutional purposes as the specified functions of the Commission, and so reliance on *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 529, and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421, is misplaced. We reject for similar reasons the contention that *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, is controlling here. Our holding that the Federal Power Commission's authority did not extend to production and gathering of natural gas was specifically grounded in a provision of the Natural Gas Act to that effect. 337 U. S., at 504–505.

V. *The National Transportation Policy.*—What we have said above answers appellants' companion contention that the rules are invalid because they violate the National Transportation Policy as set out in 49 U. S. C., preceding § 1. Regulation under the Act is there declared to be in the interests of the preservation of the inherent advantages of all modes of transportation, and of an economically sound, safe, and efficient industry. See *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419, and *United States* v. *Texas & Pacific Motor Transport Co.,* 340 U. S. 450. But no overly-nice distinction between law and policy is needed to support

[12] 79 Cong. Rec. 12207–12211; 12222–12225.

the view that the question is hardly one for the courts; it is clear that the rules represent, at best, a compromise between stability and flexibility of industry conditions, each alleged to be in the national interest, and we can only look to see if the Commission has applied its familiarity with transportation problems to these conflicting considerations. The mere fact that a contrary position was taken during the war years when active interchange and leasing were required,[13] that the Commission has never before restricted trip-leasing and has in fact approved it from time to time,[14] does not change our function.

VI. *Reasonableness of Rules and Exemptions Therefrom.*—The relationship of these rules to the regulatory scheme they are designed to protect forms a basis for the answer to the various allegations that certain rules are arbitrary. For our purposes, such an argument must mean that the Commission had no reasonable ground for the exercise of judgment. In the instant case, such is not the situation; the evidence marshalled before the Commission plainly supports the conclusion that the continued effectiveness of its regulation requires the rules prescribed.

We also affirm a reasonable relationship between the aims of the federal regulatory scheme and the exemptions in the rules. That as to interchange between carriers over routes which both are authorized to serve, Rule § 207.3

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[13] See footnote 8, *supra.*

[14] *Dixie Ohio Express Co. Common Carrier Application,* 17 M. C. C. 735; *Greyvan Lines, Inc., Common Carrier Application,* 32 M. C. C. 719. See, however, I. C. C. Administrative Ruling No. 4, August 19, 1936, which represents an early effort on the part of the Commission to bring leased equipment under the control of the carriers for purposes of the Act. This was apparently abandoned after this Court's decisions in *United States* v. *Rosenblum Truck Lines, Inc.,* 315 U. S. 50, and *Thomson* v. *United States,* 321 U. S. 19.

(a), is founded on the proposition that unauthorized certificate extensions are here impossible. The exemption extended to trucking equipment used in railway express operations, Rule § 207.3 (b), which are largely confined to municipalities and contiguous areas, and short trips, duplicates the similar exemption applicable to contract and common carriers in Rule § 207.3 (c). It is alleged that the exclusion of the substituted motor-for-rail transport equipment from the rules' coverage by Rule § 207.3 (b) also is based on the fact that the evils of unauthorized service, lax observation of safety regulations, and demoralized competitive conditions are not present in such operations. As the Commission found, the leasing practices in the field are undertaken through long-term contracts with certain established lessors, and the equipment inspected and controlled by the railroads, and identified with its name. In such a context, the exemption is not unreasonable; certainly it is not required that the Commission extend its supervisory activities under the rules into fields where the evidence before it indicates no need, merely to satisfy some standard of paper equality. And this is especially so in the field of substituted motor-for-rail carriage which falls within the Commission's strict regulation by virtue of the restrictions which we approved in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, and *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U. S. 450. The exemption for plans of operations merged under § 5 of the Act, Rule § 207.3 (d), is said to have been directed solely toward Allied Van Lines, whose § 5 proceeding, reported *Evanston Fireproof Warehouse—Control—Allied Van Lines,* 40 M. C. C. 557, involving a unique leasing arrangement by stockholding hauling agents under the company's name, has already been scrutinized by the Commission. Since Allied operates entirely with equipment supplied under this ar-

rangement, and since the Commission has specifically approved it, it seems to us that the exemption has a reasonable basis; the guarantees of insurance coverage, financial responsibility, lessee route control and equipment identification in Allied's operations, 40 M. C. C. 551, 563–566, promise protection against the evils the rules seek to correct.

VII. *Preservation of the Right to Augment Equipment.*—Appellants further contend, however, that the rules in effect will violate the protections in §§ 208 (a) and 209 (b) of the Act of the carriers' right to augment their equipment.[15] We do not agree. The provisos in question are not to be read as blanket restrictions on the Commission's regulatory powers; they are aimed at the restrictions on the increase in volume of traffic through acquisition of additional vehicles. Clearly, a numerical limitation would be invalid, but the Commission's refusal to permit carriers to secure and use equipment which does not satisfy its safety, loading, and licensing rules would not. As we pointed out in *Crescent Express Lines, Inc.* v. *United States*, 320 U. S. 401, 408, in sustaining a certifi-

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[15] "Sec. 208. (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered . . . : *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Sec. 209. "(b) . . . The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof . . . *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

cate limited to seven-passenger vehicles, since § 208 "requires the Commission to specify the service to be rendered, this could not be done without power also to specify the general type of vehicle to be used." We think it equally apparent that regulation of the conditions and circumstances of the use of nonowned vehicles is not a "limitation on the addition of more vehicles of the authorized type." 320 U. S., at 409.

VIII. *Preservation of Agricultural Exemption.*—As indicated above, the Act also exempts from Commission jurisdiction "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation," § 203 (b)(6),[16] and appellants, and particularly the intervening Secretary of Agriculture, urge that the rules will drastically reduce the significance of this section in violation of Congress' intent. All admit, of course, that the rules do not directly apply to agricultural equipment; it is merely required that authorized carriers using such trucks comply with certain provisions. But it is contended that the preconditions to such use imposed on those within Commission jurisdiction will wipe out much of the traffic which the agricultural carriers have heretofore engaged in. It appears, for instance, that a substantial leasing is built on agricultural haulers who would otherwise return empty to their place of departure, having unloaded the farm produce carried; the authorized carriers have found them prepared to accept a one-trip engagement for the return route. The thirty-

[16] Likewise exempted are "motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm." § 203 (b)(4a).

day lease provision will make such arrangements impossible.

We are unable, however, to conclude that the economic danger to the agricultural truckers from these rules constitutes a violation of § 203 (b)(6). The mere fact that commercial carriers of agricultural products will hereafter be required to establish their charges on the basis of an empty return trip is not the same as bringing them within Commission jurisdiction generally. The exemption extends, by its own words, to carriage of agricultural products, and not to operations where the equipment is used to carry other property. Needless to say, the statute is not designed to allow farm truckers to compete with authorized and certificated motor carriers in the carriage of non-agricultural products or manufactured products for off-the-farm use, merely because they have exemption when carrying only agricultural products. We can therefore find nothing in it which implies protection of agricultural truckers' right to haul other property, even though from an economic standpoint that right is important to protect profit margins. Regulated truckers must also receive protection upon their restricted routes and limited carriage. A balance between these competing factors, carried out in accordance with congressional purpose,[17] does not seem to us unreasonable or invalid.

IX. *Agency Procedure.*—We need not pause long over certain procedural objections which appellants have interposed. They object that the rules were the product of proceedings fatally at variance with certain requirements of the Administrative Procedure Act. Appellants in No. 35 point to the requirement of § 7 (c), that "the

[17] The National Transportation Policy, 49 U. S. C., preceding § 1, specifically refers to "fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each."

proponent of a rule or order shall have the burden of proof," and insist that the Commission, or its Motor Carriers Bureau which drew up suggested rules published as a supplement to the hearing order, 13 Fed. Reg. 369, did not satisfy this burden by preponderating evidence. But even assuming that the Commission was a statutory "proponent" of the regulation and that it did not actively introduce the requisite degree of proof in support of its position, we think it plain that the requirement is inapplicable to the instant proceedings. For § 7 of the Administrative Procedure Act is limited by its own terms to "hearings which section 4 or 5 requires to be conducted pursuant to this section." Turning to those sections, it is found that they invoke § 7 only when specified by statute: "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." [18] In short,

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[18] Section 4 of the Administrative Procedure Act sets out only the following applicable requirements:

"(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .

"(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose." 60 Stat. 237, 239, 5 U. S. C. § 1003.

There is no question but that the Federal Register notice and participation requirements were satisfied. See p. 307, *supra*.

§ 7 applies only when hearings were required by the statute under which they were conducted to be made on the record and with opportunity for oral hearing. As we have pointed out, the rule-making authority in the instant case stems from § 204 (a)(6) of the Motor Carrier Act; nothing there requires record or hearing, in direct contrast with the rate-making procedure provisions of §§ 216 (e) and 218 (b). Hence, whatever our view of the substantiality of the evidence, we do not think that the rules must fall because the Commission failed to assume and satisfy a "burden of proof."

Similar reasoning supports our conclusion that § 8 (b) of the Administrative Procedure Act, which requires that decisions shall "include a statement of (1) findings and conclusions," invoked by appellants in No. 26, is likewise inapplicable. For it, in turn, is limited to a "hearing . . . required to be conducted in conformity with section 7."

X. *Right to Introduce Evidence of Confiscation.*— Finally, appellants assign as error the refusal of the District Court in No. 35 to permit introduction of additional oral evidence there. Their offer of proof indicated that it would concern the "value of Plaintiffs' property and rights" and "the effect of the order on said property and rights." This Court has indicated many times, it is true, that those concerned with an order affecting their just compensation for transportation services must be heard; indeed, their right to introduce evidence to support the claim that the order in question will unconstitutionally confiscate their property may be enforced even in the District Court, if the Commission bars an opportunity to do so. *Manufacturers R. Co.* v. *United States,* 246 U. S. 457, 488–490; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 53–54; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 362–369; *New York* v. *United States,* 331 U. S. 284, 334–335.

But the right is not to be construed as an avenue toward delay. The claim of confiscation must be substantial, the import of the proffered evidence clear, and the inability to test the question before the Commission patent, in order to justify an oral hearing on the question in the courts. In the case at bar, appellants seek in substance to show that the outlawing of trip-leasing will affect their business; perhaps they might even be able to prove that some concerns would fail if they were unable in the future to resort to nonowned equipment for short periods. In this context, however, we do not think that a right to trial *de novo* is automatically established merely because the Commission denied a petition for rehearing which invoked constitutional principles. In the first place, there was in truth a multitude of evidence before the Commission on the importance of trip-leasing to some concerns. Moreover, we are clear that appellants had an opportunity to introduce this very evidence in the agency proceedings, for it required no great prescience, in view of the notice of the hearings published by the Commission, to know that they would concern the importance and desirability of the very practices appellants seek to protect.

"Confiscatory" is not a magic word. Whether it should open the door to further proceedings depends on the nature of the order attacked. We think a claim of rate confiscation, which was the concern of the cases just cited, stands on a fundamentally different footing from that made in the instant case.[19] Rate-making represents an order affecting the volume of income; it is said to confiscate property when it prohibits a reasonable return on

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[19] We have already noted the Motor Carrier Act itself distinguishes between the scope of a hearing required in rate proceedings and those held in relation to general rule-making under § 204 (a) (6).

investment beyond operating and initial costs. But the economic significance of the abolishment of trip-leasing is not nearly so direct. The Commission has merely determined by what method the carrier's income is to be produced, and not how much it may charge.

It is true that we have admonished the Commission and the courts to permit introduction of evidence on the economic impact of a rate order where the claim that it could not have been proffered during the original proceedings was genuine. But that was because the "constitutional right of compensation," *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 54, was drawn in question. Here, appellants can make no comparable claim. They attack an order which is valid even if its effect is to drive some operators out of business. As we have indicated, the rule-making power is rooted in and supplements Congress' regulatory scheme, which in turn derives from the commerce power. The fact that the value of some going concerns may be affected, therefore, does not support a claim under the Fifth Amendment, if the rules and the Act be related, as we have said they are, to evils in commerce which the federal power may reach.[20] This being the case, appellants had no constitutional

[20] Compare the principles applicable to rate-making with what we have said about the Fifth Amendment in the related field of wage and hour laws under the commerce power, *United States* v. *Darby,* 312 U. S. 100, 125. This Court has pointed out many times that the exercise of the federal commerce power is not dependent on its maintenance of the economic *status quo;* the Fifth Amendment is no protection against a congressional scheme of business regulation otherwise valid, merely because it disturbs the profitability or methods of the interstate concerns affected. *Labor Board* v. *Jones & Laughlin S. Corp.,* 301 U. S. 1, 43–45; *Currin* v. *Wallace,* 306 U. S. 1, 13–15; *United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533, 572–573; *North American Co.* v. *Securities & Exchange Comm'n,* 327 U. S. 686, 707–710; *American Power & Light Co.* v. *Securities & Exchange Comm'n,* 329 U. S. 90, 106–108.

claim in support of which they are entitled to introduce evidence *de novo,* and the court did not err in sustaining the objection thereto.

Affirmed.

APPENDIX TO OPINION OF THE COURT.

Rules prescribed governing the practices of authorized carriers of property by motor vehicle in Interstate or Foreign Commerce in (1) augmenting equipment, (2) interchanging of equipment, and (3) renting vehicles or equipment to private carriers or shippers

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§ 207.3 *Exemptions.*—Other than § 207.4 (c) and (d), relative to inspection and identification of equipment, these rules shall not apply—

(a) To equipment leased by one authorized carrier operating over regular routes to another authorized carrier operating over regular routes and operated between points and over routes which both lessor and lessee are authorized to serve, and to equipment leased by one authorized carrier operating over irregular routes to another such carrier and operated between points and within territory which both the lessor and lessee are authorized to serve;

(b) To equipment utilized wholly or in part in the transportation of railway express traffic, or in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations on railroad billing;

(c) To equipment utilized in transportation performed solely and exclusively within any municipality, contiguous municipalities, or commercial zone, as defined by the Commission;

(d) To equipment utilized by an authorized carrier in transportation performed pursuant to any plan of opera-

tion approved by the Commission in a proceeding arising under section 5 of the Interstate Commerce Act . . . .

. . . . . .

§ 207.4 *Augmenting equipment.*—Other than equipment exchanged between motor common carriers in interchange service as defined in § 207.5 of these rules, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) The contract, lease, or other arrangement for the use of such equipment—

(1) Shall be made between the authorized carrier and the owner of the equipment;

(2) Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements;

(3) Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employees of the owner; . . . .

. . . . . .

(4) Shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the authorized carrier, ...

. . . . . .

(5) Shall specify the compensation to be paid by the lessee for the rental of the leased equipment; provided, however, that such compensation shall not be computed on the basis of any division or percentage of any applicable rate or rates on any commodity or commodities transported in said vehicle or on a division or percentage of any revenue earned by said vehicle during the period for which the lease is effective;

(6) Shall specify the time and date or the circumstance on which the contract, lease, or other arrangement begins, and the time or the circumstance on which it ends. The duration of the contract, lease, or other arrangement shall coincide with the time for the giving of receipts for the equipment, as required by paragraph (b) of this section . . . .

. . . . .

(c) *Inspection of equipment.*—It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected . . . .

. . . . .

(d) *Identification of equipment.*—The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such equipment as operated by it . . . .

. . . . .

(e) *Driver of equipment.*—Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under these rules, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in, violation of any provision of parts 192, 193, 195, and 196 of the Motor Carrier Safety Regulations (Rev.) pertaining to "Driving of Motor Vehicles," "Parts and Accessories Necessary for Safe Operation," "Hours of Service of Drivers," and "Inspection and Maintenance," and to require such driver to furnish a certificate of physical examination in accordance with part 191 of the Motor Carrier Safety Regulations (Rev.) pertaining to "Qualifications of Drivers," or, in lieu thereof, a photostatic copy of the original certificate of physical examination, which shall be retained in the authorized carrier's file.

(f) *Record of use of equipment.*—The authorized carrier utilizing equipment operated under these rules shall prepare and keep a manifest covering each trip for which the equipment is used in its service, containing the name and address of the owner of such equipment, the make, model, year, serial number, and the State registration number of the equipment, and the name and address of the driver operating the equipment, point of origin, the time and date of departure, the point of final destination, and the authorized carrier's serial number of any identification device affixed to the equipment. . . .

§ 207.5 *Interchange of equipment.*—Common carriers of property may by contract, lease, or other arrangement, interchange any equipment defined in § 207.2 of these rules with one or more other common carriers of property, or one of such carriers may receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following conditions:

(a) *Agreement providing for interchange.*—The contract, lease, or other arrangement providing for interchange shall specifically describe the equipment to be interchanged; the specific points of interchange; the use to be made of the equipment and the consideration for such use; and shall be signed by the parties to the contract, lease, or other arrangement, or their regular employees or agents duly authorized to act for them, in the execution of such contracts, leases, or other arrangements.

(b) *Authority of carriers participating in interchange.*—The certificates of public convenience and necessity held by the carriers participating in the interchange arrangement must authorize the transportation of the commodities proposed to be transported in the through movement, and service from and to the point where the physical interchange occurs.

(c) *Driver of interchanged equipment.*—Each carrier must assign its own driver to operate the equipment that is proposed to be operated from and to the point or points of interchange and over the route or routes or within the territory authorized in the participating carriers' respective certificates of public convenience and necessity.

(d) *Through bills of lading.*—The traffic transported in interchange service must move on through bills of lading issued by the originating carrier, and the rates charged and revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

(e) *Inspection of equipment.*—It shall be the duty of the carrier acquiring the use of equipment in interchange to inspect such equipment, or to have it inspected in the manner provided in § 207.4 (c) of these rules; and equipment which does not meet the requirements of the safety regulations shall not be operated in the respective services of the interchange carriers until the defects have been corrected.

(f) *Identification of equipment.*—The authorized carriers operating equipment in interchange service under this section shall carry with each vehicle so operated a copy of the contract, lease, or other arrangement while the equipment is being operated in the interchange service.

. . . . .

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

I agree with the Court that the Interstate Commerce Act grants the Commission broad implied powers to carry out the general purposes outlined in the law. See *United*

States v. *Pennsylvania R. Co.*, 323 U. S. 612, 616. But the Commission is without power to invoke vague implications to defeat the Act's purpose or to override its clearly expressed provisions. This, I think, is what the Commission has done in most of the Commission rules which the Court upholds. In my view the rules run counter to the Act in three important respects:

A. The congressionally granted right of motor carriers to choose for themselves whether they would use leased or purchased equipment is practically destroyed by the imposition of burdensome restrictions.

B. The exemption from regulation granted carriers of agricultural products by § 203 (b) of Part II of the Act is burdened by restrictive rules that substantially take away the advantages Congress intended to confer by the exemption.

C. Railroads that operate motor vehicles as a part of the business of common carriage are granted special advantages in violation of the express policy of the Act which requires each method of transportation to be left with its inherent advantages.

A. Motor vehicle common carriage had reached an advanced stage when Congress passed the Motor Carrier Act in 1935.[1] Early development of the business was along lines that the carriers found to be advantageous. Some carriers owned their vehicles, while others leased them. The Act did not try to disrupt this system, but left motor carriers free to continue to own or lease equipment in accordance with their best financial judgment. And Congress was content to regulate the common or contract carriers themselves; it made no effort whatever to regulate those who owned the vehicles that were leased to the regulated carriers. Congress was thus talking

[1] 49 Stat. 543, as amended, 54 Stat. 919, 49 U. S. C. § 301.

about the acquisition of equipment by lease as well as by purchase when it provided that the Commission should be without power to restrict the right of carriers to add to their equipment or facilities as the development of their business and the demands of the public required.[2] While this provision is patently not designed to forbid the Commission from limiting the type of vehicles in the interest of safety,[3] the provision just as patently does deprive the Commission of power to forbid the lease and purchase of vehicles which meet the test of safety.

The new rules adopted by the full Commission put burdensome restrictions on the power to lease appropriate vehicles, restrictions which, in my view, go beyond the power of the Commission. These burdensome restrictions had been previously rejected by the Commission's Division V, composed of Commissioners particularly responsible for supervision of motor vehicle affairs as distinguished from supervision of railroad affairs. This record makes plain that enforcement of these burdensome rules will produce violent repercussions in the motor carrier industry; many motor carriers will suffer ruinous losses. The business of leasing vehicles for use by common carriers will be curtailed or perhaps even destroyed. The tendency of the rules is thus to eliminate many small business ventures. It may be, as the Commission seems to think, that the Nation's motor carrier business can be more efficiently accomplished by a few big companies that own all their equipment, than by a large number of small companies that obtain all or part of their equipment by lease. But if that governmental alteration in our business structure is to be ordained, Congress, not the Commission, should do the ordaining.

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[2] This denial of power to the Commission appears in §§ 208 (a) and 209 (b) of Part II of the Act. 49 U. S. C. §§ 308 (a) and 309 (b).

[3] *Crescent Express Lines* v. *United States*, 320 U. S. 401, 408–409.

B. The farmers of the Nation have for a long time been largely dependent upon reasonably priced motor transportation to get their produce to market.[4] When the Motor Carrier Act was under consideration, there was much apprehension expressed lest regulation deprive farmers of this advantage.[5] To meet this feeling, the bill was amended several times and finally was passed with the agricultural exemption set forth in § 203 (b). Except as to certain safety requirements § 203 (b) exempts from regulation motor vehicles of farmers and farm coopera-

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[4] For example, in 1950:

PERCENTAGES OF SELECTED FARM PRODUCTS TRANSPORTED TO PRINCIPAL MARKETS IN TRUCKS.

	Percent		*Percent*
Hogs	79	Grapefruit	43
Cattle	76	Oranges	33
Calves	78	Apples	64
Sheep and Lambs	44	Tomatoes	60
Shell Eggs	93	Potatoes	37
Dressed Poultry	76	Lettuce	41
Live Poultry	99	Milk	79

Transportation of Selected Agricultural Commodities to Leading Markets by Rail and Motortruck, 1939–50, United States Department of Agriculture, Bureau of Agricultural Economics (June 1951), Table 1, p. 10.

[5] For illustration, Congressman Walter Pierce of Oregon said, "Mr. Chairman, I have watched the debate very closely. I wonder why this bill? I am a farmer, living 300 miles from tidewater. I raise wheat and stock. The only relief I have ever seen in my 40 years on that farm from the terrific confiscatory railroad freight rates was when the trucks came.

. . . . . .

"The camel is certainly getting his nose into the tent, and this means the death of the motor transportation which the farmer has had and which has been the only relief that has come to him from the previous excessive railroad rates." 79 Cong. Rec. 12216, 12217; see also 12197–12198.

tives used for farm purposes; the same exemption is also granted to all motor vehicles while being used to carry agricultural commodities. There can be no doubt that the Commission's new rules will drive many of these carriers of farm products out of business and that many others will be compelled to increase their rates. Section 207.4 of the new rules is rather obviously designed to make this exemption much less valuable. It forbids authorized carriers to lease motor trucks except for terms of at least 30 days, if the trucks are to be operated by owners or employees of owners. The Commission reported that this rule would completely prohibit trip-leasing.[6] A very large part of all trip-leasing takes place between regulated carriers and truckers who are exempt because they carry farm products. An illustration can be found in the carriage of Florida citrus fruits. On delivering fruit in northern states the practice of these exempt truckers has been to lease their motor vehicles to regulated carriers for the transportation of goods to Florida. Unless vehicles that bring citrus fruits north can make such arrangements they must go back to Florida empty. "Empty or partially loaded trucks on return trips may well drive the enterprise to the wall." *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488. The Commission's rules make it impossible for these exempt carriers of agricultural products to get the advantage of a lease for a return haul. The result is destruction for a large part of that business.

The reason the Commission has adopted a rule so destructive of the agricultural exemption Congress granted is apparent from a colloquy which took place in the District Court. The attorney for the Commission was asked

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[6] Trip leases can be made by motor carriers specifically exempted from the rules by the Commission—railroad motor carriers, express company motor carriers, and the Allied Van Lines.

if it was wasteful for a truck to go back to Florida empty. With commendable candor he said: "It does seem uneconomical in requiring it to go back empty, but they can—The difficulty comes, I think, in letting it come up in the first place." In other words the "difficulty comes" because Congress agreed to exempt these farm products. This congressionally created "difficulty" is being cleared up by the Commission. Its new rules against trip-leasing will force these agricultural carriers to raise their rates high enough to frustrate purposes underlying the agricultural exemption.[7]

C. The Commission has exempted railroads and express companies that carry goods for hire in motor vehicles from all of the regulations except the provisions of § 207.4 (c) and (d), which latter two provisions relate to inspection and identification of equipment. It is rather interesting that while the full Commission granted the railroads this amazing exemption, Division V, the Motor Carrier Division of the Commission, refused to allow it. The Commission at the same time refused to exempt from its new rules motor carriers whose operations were shown to be substantially identical with those performed by railroad and express carriers which the Commission left free from the burdens of the rules. Since the railroads and the independent motor carriers are in competition, it is not strange to find the railroads arguing here that while the railroads' exemption should be sustained, the new rules should be applied in all their vigor to the independent motor carriers. I know of no power which the Commission has to allow railroads which

[7] This statutory agricultural exemption reflects a congressional belief that ". . . it would be better for the Congress to decide what should be exempted rather than to leave it in the hands of the Commission that might nullify the entire intentions of Congress . . . ." 79 Cong. Rec. 12225.

engage in the motor carrier business exemptions and preferences which are denied completely motor carriers not owned by railroads.

The Commission's rules as a whole fashion broad new national transportation policies different from and in conflict with those Congress adopted after mature consideration. I would reverse the judgments of the District Courts and direct that the rules be set aside as beyond the Commission's authority.

PENNSYLVANIA RAILROAD CO. *v.* O'ROURKE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 60. Argued December 8, 1952.—Decided January 12, 1953.

Respondent was employed by petitioner railroad as a "freight brakeman" in its yards. His duties included work aboard petitioner's car floats moored in navigable waters. He was injured on a car float while releasing allegedly defective hand-brakes on a freight car which was being unloaded from the car float by a switch engine. *Held:* Respondent's remedy was under the Longshoremen's and Harbor Workers' Compensation Act exclusively, and not under the Federal Employers' Liability Act. Pp. 334–342.
194 F. 2d 612, reversed.

Respondent's suit under the Federal Employers' Liability Act was dismissed by the District Court on the ground that the Longshoremen's and Harbor Workers' Compensation Act applied exclusively. 99 F. Supp. 506. The Court of Appeals reversed. 194 F. 2d 612. This Court granted certiorari. 344 U. S. 811. *Reversed,* p. 342.

John Vance Hewitt argued the cause and filed a brief for petitioner.

Richard C. Machcinski argued the cause for respondent. With him on the brief was *Herbert Zelenko.*

MR. JUSTICE REED delivered the opinion of the Court.

This certiorari requires us to determine which federal industrial accident statute—the Federal Employers' Liability Act or the Longshoremen's and Harbor Workers' Compensation Act—applies to the circumstances of this case. The petitioning railroad had employed O'Rourke in its Harismus Cove Yard at Jersey City since 1942 as a "freight brakeman." He worked as part of a five-man crew making up trains. Their duties included work on

the petitioner's car floats that moved freight and passenger cars from and to the Yard by water. The accident occurred during the night of January 28, 1948. Having already removed cars from three floats, the crew began to unload one carrying box cars. O'Rourke was required to climb up on each and release the hand-brakes, so that the cars could be pulled off the float by the engine. During the process, he fell from one and sustained the injury which is the basis for this suit. It was brought under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51 *et seq.*,[1] alleging a faulty brake mechanism maintained in violation of the Safety Appliance Acts, 27 Stat. 531, 45 U. S. C. § 1 *et seq.*, as the causative factor. The District Court granted the railroad's motion to dismiss on the ground that the Longshoremen's and Harbor Workers'

[1] 45 U. S. C. § 51:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, applied exclusively,[2] 99 F. Supp. 506, but the Court of Appeals reversed on the ground that the Liability Act covered "railroad employees injured while engaged in railroad work on navigable waters." It decided respondent was "not employed in maritime employment . . . within the meaning of the Compensation Act." 194 F. 2d 612, 615. We granted certiorari, 344 U. S. 811, because of an alleged conflict with an earlier decision of this Court, *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128.

The need for a federal statute of the Harbor Workers' Act type and scope became obvious after *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, decided in 1917, wherein it was held that neither the Federal Employers' Liability Act nor the state compensation statute applied to a railroad employee engaged in loading a vessel of the company which had no relation to its railroading operations. Specifically, the state act was held inapplicable because the matter fell exclusively within the federal admiralty jurisdiction:

> "The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction." 244 U. S., at 217.

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[2] 33 U. S. C. § 905:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, ..."

The resulting federal statute took the form of a compensation act to assure injured employees who were not seamen a prompt and certain recovery, rather than an employers' liability statute, such as was extended in 1920 to seamen by the Jones Act, 38 Stat. 1185, 46 U. S. C. § 688. A summary of the congressional attempts to bring admiralty law into harmony with modern concepts of the duty of an employer although without fault to carry the burden of industrial accidents, appears in the *Nogueira* case, 281 U. S., at 135–136. These efforts failed to meet the constitutional test of uniformity held essential in admiralty law in order to obviate conflicting requirements in maritime commerce. *Washington* v. *Dawson & Co.,* 264 U. S. 219. They failed because Congress attempted to place legislation on maritime accidents under state compensation laws. After this Court's suggestion in the *Washington* case, 264 U. S., at 227, Congress adopted the valid, exclusive and uniform compensation act now in effect for longshoremen and harbor workers. *Crowell* v. *Benson,* 285 U. S. 22. Seamen preferred to take the risks of the Jones Act. *Nogueira* v. *N. Y., N. H. & H. R. Co., supra,* at 136. This act and the Jones Act provided means for indemnification for injuries for all maritime employees who were beyond the constitutional reach of state legislation. A quarter of a century of experience has not caused Congress to change the plan. The "*Jensen* line of demarcation between state and federal jurisdiction" has been accepted. *Davis* v. *Department of Labor,* 317 U. S. 249, 256. New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water. Therefore respondent comes within the coverage of that portion of § 903 (a) that includes those outside the reach of state compensation laws.

The Federal Employers' Liability Act, 45 U. S. C. § 51, note 1, *supra,* gives a right of recovery due to defects be-

cause of carrier negligence in, among other equipment, "boats." We need not, however, in this case, determine whether the car float is a "boat" that should be regarded as in substance a part of a railroad's extension. See *Southern Pacific Co.* v. *Jensen, supra,* at 213. It is clear that whether or not the boat is an extension of the railroad under the Liability Act is immaterial. The later Harbor Workers' Act by §§ 903 (a) and 905 covered such injuries on navigable water and made its coverage exclusive. *Nogueira* v. *N. Y., N. H. & H. R. Co., supra,* at 130–131.

Whether or not the Harbor Workers' Act applies to the exclusion of the Employers' Liability Act, by virtue of the provisions of 33 U. S. C. § 905, depends on § 903 which defines its "coverage":

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ." [3]

Section 904 fixes liability for this compensation with the "employer," who in turn is defined by § 902 (4):

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The Court considered these provisions in a similar setting in the *Nogueira* case, *supra.* That case involved a railroad employee injured while loading freight into cars

[3] The portion of the section which we have omitted contains certain other conditions to applicability. None apply here. Respondent was not a member of the crew and the vessel was of more than eighteen tons.

located on a moored car float. The Harbor Workers' Act was held to apply. As was pointed out:

> "The definition [§ 903 (a)] is manifestly broad enough to embrace a railroad company, provided it has employees who 'are employed in maritime employment, in whole or in part, upon the navigable waters of the United States.' . . . From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship. A car float in navigable waters is subject to the maritime law like any other vessel." 281 U. S., at 132 and 134.

But respondent contends, in support of the result below, that the cases are distinguishable and that this language does not determine his claim. He emphasizes that Nogueira was engaged in loading the cars. This is pictured as an operation far more similar to the popular conception of a longshoreman's job than his own, which he insists was "railroading." [4]

We are clear, however, that the emphasis on the nature of respondent's duties here misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service. The portions of the *Nogueira* opinion quoted bring this railroad company within this category, since its car float operations are there held to be maritime, as they obviously are. Whether the injury occurred to an employee loading freight into cars on the float, as in the *Nogueira* case, or to one like respondent moving

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[4] The *Nogueira* case was a unanimous decision. On the same day, *Baizley Iron Works* v. *Span*, 281 U. S. 222, was decided with three dissents. An award of state compensation to Span was reversed because as a painter employed in the repair of a completed ship lying in navigable waters, a state compensation statute could not cover him.

loaded cars from a float could make no difference. Both employments are maritime. See *Nogueira* v. *N. Y., N. H. & H. R. Co., supra,* at 134. Besides § 902 (4) is directed at the employer when it speaks of maritime employment, not at the work the employee is doing. The exclusive coverage of §§ 903, 905 extends to an employee of an employer, made liable by § 904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act. An injured worker's particular activity at the time of injury determines of course whether he was injured in the course of his employment within § 902 (2), and whether he was a member of the crew of the vessel within the exceptions of §§ 902 (3) and 903 (a)(1). This explains the emphasis on the factor of the individual's job in *Parker* v. *Motor Boat Sales, Inc.,* 314 U. S. 244, 245–246, and *South Chicago Co.* v. *Bassett,* 309 U. S. 251.[5]

The Court of Appeals thought that this Court's *Nogueira* opinion left open, as did the Second Circuit's opinion in *Nogueira,* "that the mere locus of the accident necessarily determines the right." 32 F. 2d 179, at 182. We read the *Nogueira* case differently. There it was said:

> "There was no exclusion of stevedores or of those sustaining injuries upon navigable waters in loading or unloading a vessel unless it was under eighteen tons net. The application of the act in such cases was explicitly made to depend upon the question whether the injury occurred upon navigable waters and recovery therefor could not validly be provided by a state compensation statute." 281 U. S., at 136.

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[5] *Norton* v. *Warner Co.,* 321 U. S. 565; *Merritt-Chapman & Scott Corp.* v. *Willard,* 189 F. 2d 791, and *Long Island R. Co.* v. *Lowe,* 145 F. 2d 516, fall within a similar category.

Analogous cases lend weight to our conclusion. *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407, is indistinguishable on its facts.[6] The result in *Parker*, as well, is totally inconsistent with any "duties test." Armistead, the employee there, was a janitor with the motor boat company. He had been ordered to ride in one of the boats during a test trip in order to keep a lookout for hidden objects. 314 U. S., at 246. Compensation under the Harbor Workers' Act could not have been paid in connection with his death if we were to test its applicability by the nature of his regular work. A number of lower court cases are in similar vein. Those we collect in the margin deal with various types of construction and service workers, obviously not themselves engaged in traditional "maritime employment," if one were to look solely to the particular type of job they were engaged for.[7] Each was held to fall within the scope of the statute. Section 902 (4) requires the employer to pay compensation if he has "any" employees so engaged.[8] If, then, the acci-

[6] See *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244; *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; *Byrd* v. *N. Y. Central System*, 6 N. J. Super. 568, 70 A. 2d 97. *Zientek* v. *Reading Co.*, 93 F. Supp. 875, is contrary but as to this see our opinion in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190; *Job* v. *Erie R. Co.*, 79 F. Supp. 698, and *Rist* v. *Pittsburgh & Conneaut Dock Co.*, 104 F. Supp. 29.

[7] *Baizley Iron Works* v. *Span*, 281 U. S. 222 (a painter); *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481 (member of shore gang); *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949 (carpenter); *Travelers Ins. Co.* v. *Branham*, 136 F. 2d 873 (foreman of a concrete pouring gang); *Standard Dredging Corp.* v. *Henderson*, 57 F. Supp. 770 (member of shore gang); *Ford* v. *Parker*, 52 F. Supp. 98 (watchman). This list is illustrative but by no means exhaustive.

[8] *Davis* v. *Department of Labor*, 317 U. S. 249, is an illustration of the difficulty encountered in applying this standard, happily not present in the case at bar. The *Davis* case avoided uncertainty in areas where state and federal statutes might overlap. In the present case we have two federal statutes and a line marking their coverage can be drawn.

dent occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled "maritime." Such are the admitted facts of this case. The Longshoremen's and Harbor Workers' Compensation Act applies.

Reversed.

MR. JUSTICE MINTON, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE CLARK join, dissenting.

There is but one question here, and that is whether this respondent was engaged in "maritime employment" at the time of his injury. If he was, then the Longshoremen's and Harbor Workers' Compensation Act applies and not the Federal Employers' Liability Act. That was decided in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. In that case, an employee of a railroad company was trucking interstate freight from the dock onto a car float for loading in a car standing on the car float. He was likened to a stevedore. Here this railroad employee was a brakeman engaged in removing freight cars from a car float by the use of an ordinary switch engine. The cars were in interstate commerce. Preparatory to the removal of the cars from the car float, it was this railroad employee's duty to let off the brakes. He alleged that while thus engaged, the railroad's use of a defective brake in violation of the Safety Appliance Act caused him to be thrown from the freight car to the deck of the car float and injured. The car float was upon navigable waters.

Was it maritime employment to get these cars off the car float or was it railroad employment? If this railroad employee had been doing his braking job on land, no one would have thought he was engaged in anything but railroad employment. Does it become maritime employ-

ment because it happened over navigable waters? We think not. The place is the only thing that differentiates the situations. Place is admittedly not enough to make what is braking on land other than braking when done over navigable waters. Not only must we look to the place where the accident happened, but of equal importance is the nature of the employment. The nature of the employment is certainly not maritime. It was an ordinary railroad chore, done by an ordinary railroad brakeman. If this were not so, the train crews on trains being ferried across navigable streams in the United States would be employed in maritime service. With the imagination of the Court's opinion, a train crew, while crossing a bridge with its supports in a navigable stream, would be employed in maritime service.

We would treat this railroad employee as being in law what he was in real life, a railroad brakeman, engaged in interstate commerce and subject to the Federal Employers' Liability Act, and affirm this judgment.

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NATIONAL LABOR RELATIONS BOARD *v.* SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 217. Argued December 19, 1952.—Decided January 12, 1953.

Under § 10 (c) of the Labor Management Relations Act, the National Labor Relations Board ordered reinstatement of discriminatorily discharged employees of respondent, with back pay to be computed on the basis of each separate calendar quarter or portion thereof during the period from the date of discharge to the date of a proper offer of reinstatement. *Held:* The Board was entitled to a decree enforcing the order. Pp. 345–352.

(a) In devising a remedy for discriminatory discharge, the Board is not confined to the record of a particular proceeding. Pp. 348–349.

(b) There are in this case no extraordinary circumstances permitting respondent to raise here for the first time an objection based on the seasonal nature of its business, which had not been urged before the Board or the Court of Appeals. P. 350.

(c) The fact that the language of the Act was reenacted while the Board adhered to an earlier formula for computing back pay does not preclude the Board from departing from that earlier formula. Pp. 350–352.

196 F. 2d 424, reversed.

On the petition of the National Labor Relations Board for enforcement of an order, 92 N. L. R. B. 1622, the Court of Appeals denied enforcement of that part of the order prescribing a method for computing back pay. 196 F. 2d 424. This Court granted certiorari. 344 U. S. 811. *Reversed,* p. 352.

Mozart G. Ratner argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, George J. Bott* and *David P. Findling.*

Frank A. Constangy argued the cause for respondent. With him on the brief were *Marion A. Prowell* and *Albert B. Bernstein.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Acting under § 10 (c) of the Labor Management Relations Act, 1947 (the Taft-Hartley Act), 61 Stat. 136, 147, 29 U. S. C. (Supp. IV) § 160 (c), the National Labor Relations Board ordered the reinstatement of eleven discriminatorily discharged employees of the Seven-Up Bottling Company, with back pay "to be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company.*" 92 N. L. R. B. 1622, 1640. In the *Woolworth* case, 90 N. L. R. B. 289, the Board said:

> "The public interest in discouraging obstacles to industrial peace requires that we seek to bring about, in unfair labor practice cases, 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.' In order that this end may be effectively accomplished through the medium of reinstatement coupled with back pay, we shall order, in the case before us and in future cases, that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of reinstatement. The quarterly periods, hereinafter called 'quarters,' shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which [the employee] would normally have earned for each such quarter or portion thereof, [his] net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter." 90 N. L. R. B., at 292–293.

In the proceeding in which the Board sought enforcement of the order against the Seven-Up Bottling Com-

pany, the Court of Appeals sustained the claim of the Company that the *Woolworth* formula could not be applied against it: "The employee is entitled to be made whole, but no more. The employees here involved were not compensated on a quarterly basis. We see no sufficient reason to so compute their back pay during suspension. . . . There is nothing to indicate that the conditions apprehended by the Board in the Woolworth case, exist here." 196 F. 2d 424, 427–428. Accordingly, the court modified the Board's order so that back pay would be awarded on the basis of the entire period during which an employee was denied reemployment in violation of the Act rather than on a quarterly basis. Since the general method of computing back pay is obviously a matter of importance in the administration of the Act, we brought the case here. 344 U. S. 811.

Section 10 (c) of the Taft-Hartley Act, under which the Board made its award, derives unchanged, so far as is now relevant, from the National Labor Relations (Wagner) Act. 49 Stat. 449, 454. It charges the Board with the task of devising remedies to effectuate the policies of the Act. Of course the remedies must be functions of the purposes to be accomplished, and in making back pay awards, the Board operates under a further limitation. It must have regard for considerations governing the mitigation of damages; it must, that is, heed "the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 198. Subject to these limitations, however, the power, which is a broad discretionary one, is for the Board to wield, not for the courts. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience. When the Board, "in the exercise of its informed discretion," makes an order of restoration by way of back pay, the order "should

stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *Labor Board,* 319 U. S. 533, 540. The *Woolworth* formula, as a general method of computation, is, under this test, proof against judicial challenge.

The Board's very first published order awarded as back pay wages which would normally have been earned "during the period from the date of . . . discharge to the date of [an] offer of reinstatement . . . less the amount . . . earned subsequent to discharge . . . ." *Pennsylvania Greyhound Lines, Inc.,* 1 N. L. R. B. 1, 51 (1935), enforced *sub nom. Labor Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261. For fifteen years the Board followed the practice it had laid down in that case and calculated back pay on the basis of the entire period between discharge and offer of reinstatement. In 1950, in *F. W. Woolworth Company, supra,* the Board said: "The cumulative experience of many years discloses that this form of remedial provision falls short of effectuating the basic purposes and policies of the Act." 90 N. L. R. B., at 291. The Board considered that its *Pennsylvania Greyhound* formula for computing back pay adversely affected "the companion remedy of reinstatement." When an employee, sometime after discharge, obtained a better paying job than the one he was discharged from, it became profitable for the employer to delay an offer of reinstatement as long as possible, since every day the employee put in on the better paying job reduced back pay liability. Again, the old formula, in the same circumstances, put added pressure on the employee to waive his right to reinstatement, since by doing so he could terminate the running of back pay and prevent the continuing reduction of the sum coming to him. To avoid these consequences the

Board laid down its new method of computation. 90 N. L. R. B., at 292–293.

It is not for us to weigh these or countervailing considerations. Nor should we require the Board to make a quantitative appraisal of the relevant factors, assuming the unlikely, that such an appraisal is feasible. As is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the Board's conclusions may "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . ."; and they are none the worse for it. *Chicago, Burlington & Quincy R. Co.* v. *Babcock*, 204 U. S. 585, 598. It is as true of the Labor Board as it was of the agency in the *Babcock* case that "[t]he Board was created for the purpose of using its judgment and its knowledge." *Ibid.*

It will not be denied that the Board may be mindful of the practical interplay of two remedies, back pay and reinstatement, both within the scope of its authority. Surely it may so fashion one remedy that it complements, rather than conflicts with, another. It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act. Cf. *Labor Board* v. *Gullett Gin Co.*, 340 U. S. 361. Of course, *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, dealt with a different situation, and its holding remains undisturbed.

It is urged, however, that no evidence in this record supports this back pay order; that the Board's formula and the reasons it assigned for adopting it do not rest on data which the Board has derived in the course of the pro-

ceedings before us. But in devising a remedy the Board is not confined to the record of a particular proceeding. "Cumulative experience" begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process. "[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . . ." *Phelps Dodge Corp.* v. *Labor Board, supra,* 313 U. S., at 194. That competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding.

This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act. The Company in this case maintains that it operates a seasonal business, that its employees may earn three times as much in the first and fourth quarters of a year as in the second and third, and that a quarterly calculation of back pay would in this context be obviously unjust. The Board suggests that it will be time enough to deal with such special facts in this case if the Board and the Company cannot agree on the fair application of the *Woolworth* formula after the order is sustained. But in case of such disagreement, the Company can be heard as of right on the issue it now raises only in the course of contempt proceedings and at the risk involved in them. We do not think contempt proceedings are appropriate for the settlement of such an issue. *Phelps Dodge Corp.* v. *Labor Board, supra,* 313 U. S., at 200. Indeed, the Board's pre-*Woolworth* formula was adapted to varying

circumstances as a result of proceedings had before the Board prior to the issuance of orders. See, *e. g., Crossett Lumber Company,* 8 N. L. R. B. 440, 496–498; *Gullett Gin Company, Inc.,* 83 N. L. R. B. 1, 2, n. 4, enforced *sub nom. Labor Board* v. *Gullett Gin Co., supra.* We assume that the *Woolworth* formula will be applied in like manner.

In any event, this aspect of the problem is not now properly here. The Company never made before the Board the objection it now bases on the seasonal nature of its business. Section 10 (e) of the Act, 61 Stat. 136, 147, 148, 29 U. S. C. (Supp. IV) § 160 (e), provides: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." In its Exception XXII to the Intermediate Report of the Trial Examiner, the Company objected that the recommendations as to the remedy were contrary to, and unsupported by, the evidence and contrary to law. This is not adequate notice that the Company intends to press the specific issue it now raises. *Marshall Field & Co.* v. *Labor Board,* 318 U. S. 253. The Company did not urge this issue either before the Board or in the Court of Appeals. No extraordinary circumstances are present such as would justify permitting the issue to be raised here for the first time.

The Company contends, finally, that though it might have been within the authority of the Board to devise the *Woolworth* formula under the language of the National Labor Relations Act, the fact that that language was reenacted while the Board adhered to its pre-*Woolworth* formula has deprived the Board of power to depart from the latter. We are told that Congress studied with unusual care the case law which had developed under the statute Congress was revising and reenacting by the Labor

Management Relations Act, and that it adopted new language whenever it desired results other than the ones reached by the cases. We are cited to *Labor Board* v. *Gullett Gin Co., supra,* and asked to conclude as a general proposition that whenever Congress reenacted without change provisions of the National Labor Relations Act it thereby froze administrative decisions rendered under those provisions. *Gullett Gin* carries no such generalization. Having held that the Board's practice of failing to deduct unemployment compensation payments in the calculation of back pay awards did not go beyond its powers, we said in that case that our holding was supported by the fact that Congress had reenacted the relevant part of § 10 (c) of the National Labor Relations Act with what we took to be notice of this practice. We thought Congress could be said to have agreed that the Board was acting within the authority Congress meant it to have.

Assuming Congress was aware of the Board's pre-*Woolworth* practice of calculating back pay on the basis of the entire period from discharge to offer of reinstatement, we could say here, as we did in *Gullett Gin,* that Congress by its reenactment indicated its agreement that the Board's practice was authorized. That leads us nowhere on the present issue, though it is only this far that what we said in *Gullett Gin* can lead us. In that case as here, again assuming notice, if Congress was satisfied that the Board was acting within its powers, the thing for it to do was what it did—reenact without change. In that case as here—though, of course, we had no occasion to say so in that case—if Congress had been more than satisfied with the Board's practice, if it had wanted to be certain that the Board would not in future profit by its experience, it would have had to do more than it did; it would have had to change the language of the statute so as to take from the Board the discretionary

power to mould remedies suited to practical needs which we had declared the Board to have and which the Board was asserting and exercising. We cannot infer an intent to withdraw the grant of such power from what is at most a silent approval of specific exercises of it.

We hold that the Board's order is to be enforced.

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

I agree that the Board has the power to use the *Woolworth* formula in computing back pay awards. But I do not think that its application in every case, regardless of the circumstances, is in accord with the policy of the Act. In the usual case computation of back pay awards on a quarterly basis will serve the purpose of making the employee whole; and it may even be necessary to effectuate the remedy of reinstatement. On the other hand the use of the formula may in some cases produce an inequitable result.

Where, as here, an employer's business fluctuates, the employee's income will not be constant. He will earn more in one month than the next, more in one quarter than the next. Seasonal variations in the business may result in a high total income for one quarter and a low total for the next. A discharged employee, who secures other employment at a normal and constant rate of income, may achieve a yearly rate of pay substantially equal to that of his regular job. That apparently is this case. If, therefore, back pay is computed in this case on a quarterly basis, the employee will probably receive an award in excess of the amount of income he would have earned had he not been discharged. For the quarter during which he would have earned a large amount, he would be awarded the difference between that amount and the lower amount he earned at the outside employment. For

a quarter during which his income would have been low he would receive no back pay, provided his outside employment yielded him more than his old job. The net result will probably be that this employee will receive a total amount of earned income, plus back pay, which exceeds what he would have earned at his regular job. Such a result is both inequitable and unwarranted. The Board should not be allowed to use this formula for back pay when in a given case it glaringly works an injustice. There are exceptions to most general rules; and the Board should be the guardian of the exceptions, as well as the formula itself.

MR. JUSTICE MINTON, with whom THE CHIEF JUSTICE joins, dissenting.

It seems to us that we enter a "bog of logomachy" when we start to retract what we plainly said twelve years ago in *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7, and reaffirmed as late as 1951 in *Labor Board* v. *Gullett Gin Co.,* 340 U. S. 361. The statute was the same then as now.

In the *Republic Steel* case, the Board had ordered the company to deduct from the back pay due wrongfully discharged employees the amounts they had received on "work relief" projects and to pay the amounts so deducted to the United States Government. On review only of the question of the payment of these amounts to the Government, this Court held that there was no authority for the payment to the Government of the sums the employees had earned on work relief. Such payment to the Government had nothing to do with making the employees whole and only punished the employer.

In construing the pertinent provisions of the statute in this case, the Court said:

> "[The Board] can direct the employer to bargain with those who appear to be the chosen representa-

tives of the employees and it can require that such employees as have been discharged in violation of the Act be reinstated with back pay. All these measures relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

"As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of § 10 (c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order—'requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.'

"This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Co.* v. *National Labor Relations*

Board, 305 U. S. 197, 235, 236. See, also, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 267, 268. We adhere to that construction." 311 U. S. 7, 11–12.

As we understand the decisions of this Court up to now, they have all held that the power of the Board to effectuate the policies of the Act is remedial and is for the purpose of making the employee whole and not of punishing the employer. It is conceded and cannot be denied that the rule heretofore applied by the Board in calculating back pay does not fail to make the employee whole.

The rule undoubtedly derives from the common-law rule of damages for the breach by the employer of a contract of employment. The measure of damages is what an employee would have earned if he had not been wrongfully discharged, less what he did earn during the period of the breach. *American Trading Co.* v. *Steele,* 274 F. 774, 782; 5 Williston, Contracts (rev. ed. 1937), § 1358; McCormick on Damages (1935) §§ 158, 160.

By the quarterly calculation approved by the Court in the instant case, not only may a wrongfully discharged employee often receive as back pay a greater amount than he would have received had he worked at his regular job, but the employer must pay more than he would have had to pay if he had had the employee's services during the period. Thus, both of the avowed purposes of the rule which this Court has held must guide the Board in allowing back pay have been violated, namely, the employee is made more than whole, and the employer has accordingly been penalized.

The employees here were not employed or paid on a quarterly basis. The statute does not require that they be reimbursed on a quarterly basis. The statute as interpreted by this Court requires the employees to be made whole. This rule, as heretofore applied, will always do

that. The employee is entitled to no more, the employer to no less.

This Court having laid down this rule, the Board having consistently applied it for over twelve years, and Congress having considered and completely overhauled the Act in 1947 without changing this provision of the statute with its long interpretation, we think it has become part of the administrative practice that Congress should change if it is to be changed. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 114; *Taft* v. *Commissioner*, 304 U. S. 351, 357; *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Stairs* v. *Peaslee*, 18 How. 521, 526.

EDELMAN *v.* CALIFORNIA.

CERTIORARI TO THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA FOR LOS ANGELES COUNTY.

No. 85. Argued November 19, 1952.—Decided January 12, 1953.

Certiorari to review petitioner's state-court conviction under a California vagrancy statute was improvidently granted and the writ is dismissed. Pp. 358–362.

1. The claim that his conviction violated the Due Process Clause of the Fourteenth Amendment, because the statute was vague and uncertain, is not properly before this Court when the conviction was affirmed below by default in accordance with state law. Pp. 358–359.

2. The claim that his rights under the Equal Protection Clause of the Fourteenth Amendment were infringed by discriminatory enforcement of the vagrancy statute was disposed of on state procedural grounds and cannot be considered here. P. 359.

3. Denial of his motion to recall the remittitur and vacate the judgment of the appellate court rested on an adequate state ground; and the claim that this denial deprived him of a hearing in the appellate court contrary to the Due Process Clause of the Fourteenth Amendment cannot be considered here. Pp. 359–362.

Certiorari dismissed.

Petitioner was convicted in a state court under a vagrancy statute and his conviction was affirmed by a state appellate court. This Court granted certiorari. 343 U. S. 955. *Writ dismissed,* p. 362.

Emanuel Redfield argued the cause for petitioner. *A. L. Wirin* and *Fred Okrand* filed a brief for petitioner.

Philip E. Grey argued the cause for respondent. With him on the brief were *Ray L. Chesebro* and *Bourke Jones.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner stands convicted under § 647 (5) of the Penal Code of California, which provides in relevant part that "Every . . . dissolute person . . . [i]s a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment." The conviction was affirmed by the Appellate Department of the Los Angeles County Superior Court in an order which recited that the appeal had been submitted without argument. A motion to recall the remittitur and vacate the judgment of the appellate court was denied without opinion after a full hearing before three judges. We granted certiorari because of serious constitutional questions raised as to the validity of the vagrancy statute and its application to the petitioner. 343 U. S. 955. However, on oral argument, doubts arose as to whether the federal questions were properly presented by the record. Accordingly, it is necessary at the outset to determine whether we have jurisdiction in this case.

Petitioner contends, first, that his conviction violates the Due Process Clause of the Fourteenth Amendment because the vagrancy statute is vague, indefinite and uncertain. The record indicates that this defense was not raised on trial but was presented for the first time as the fifth of petitioner's grounds of appeal, stated as follows: "5. Vagrancy statute is unconstitutional because vague and indefinite."

It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. *Hulbert* v. *City of Chicago,* 202 U. S. 275 (1906); *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 308 (1903). Noncompliance with such local law can thus be an adequate state ground

for a decision below. Aside from state law regarding the scope of review in cases such as this one, we note that California permits affirmance in criminal cases where the appellant fails to appear.[1] It follows that the question whether the vagrancy statute is invalid under the Fourteenth Amendment is not properly before us.

The argument that petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment were infringed by discriminatory law enforcement merits only brief comment. The evidence adduced on trial showed at most that the vagrancy statute is not used by the Los Angeles authorities in all of the cases in which it might be applicable. Doubtless recognizing the necessity of showing systematic or intentional discrimination, petitioner made an offer of proof phrased as follows, "I want to show by the police records that there are thousands and thousands of individuals in this city that are walking around that have committed many more offenses than this defendant that have never been charged with vagrancy." This offer was made in connection with a subpoena addressed to the local police records section. On motion of the city attorney the subpoena was quashed on the ground that the accompanying affidavit did not comply with the requirements of state law. Since California law determined this action, there is no federal question preserved for review in this aspect of the case. *Hedgebeth* v. *North Carolina,* 334 U. S. 806 (1948).

Petitioner urges, finally, that he was deprived of notice and opportunity to have a hearing in the appellate court. A careful study of the record discloses these facts: On

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[1] See *People* v. *Garza,* 86 Cal. App. 97, 260 P. 390 (1927); Rule 8, Rules on Appeal from Municipal Courts and Inferior Courts in Criminal Cases, as amended to January 6, 1947; Deering's Cal. Penal Code, 1949, § 1253; *People* v. *Sukovitzen,* 67 Cal. App. 2d 901, 155 P. 2d 406 (1945).

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December 13, 1949, one day after sentence was imposed, the attorney who represented petitioner during the nine-day trial in Los Angeles Municipal Court filed written notice of appeal in that court. An application for substitution of attorneys was there filed and granted on February 7, 1950. The substituted attorney thereafter appeared in the trial court at hearings on the settlement of the statement on appeal. Preparation of that statement was a lengthy process, not concluded until June 18, 1951, when it was allowed and settled in final form by the trial judge.[2]

After the Appellate Department affirmed the conviction, petitioner filed a motion to "Recall the Remittitur and to Vacate the Judgment" of the Appellate Department on the ground that its judgment "was occasion[ed] by the inadvertence, and mistake of fact of the defendant and of the clerk of the above entitled court, and on the incomplete presentation of all the facts and law by the defendant . . . ." In a supporting affidavit, petitioner's original attorney stated that he received notice that the appeal had been set for argument; that he then went to the office of the Appellate Department clerk and advised the person attending the desk that the substituted attorney was the proper person to notify, and was assured that petitioner's then counsel would be notified of the date of the hearing. Substituted counsel filed an affidavit stating that he had not received such notice.[3]

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[2] Apparently the statement was agreed upon some time before June 18, judging from the docket entry of November 6, 1950, "Defendant's Counsel to engross Statement on Appeal," and an affidavit dated March 7, 1951, showing service of the engrossed statement on substituted counsel.

[3] Rule 3 (b) of Revised Appellate Department Rules provides, in part, that "Failure of the clerk to mail any such notice [of hearing] shall not affect the jurisdiction of the Appellate Department."

The motion to recall the remittitur and vacate the judgment of the Appellate Department asserted no deprivation of any federal constitutional right. Further, the motion sought what, under California law, is an extraordinary remedy, not available where the court had "jurisdiction to render the judgment complained of and it does not affirmatively appear that it was the result of fraud, imposition or misapprehension of facts." *People* v. *Stone,* 93 Cal. App. 2d 858, 861, 210 P. 2d 78, 80 (1949) and cases there cited; 23 Calif. L. Rev. 354.[4] Respondent has also suggested that state habeas corpus was available to petitioner to test the constitutionality of his restraint. This is borne out by *In re Bell,* 19 Cal. 2d 488, 122 P. 2d 22 (1942), in which the State Supreme Court decided that California habeas corpus may be used to test the constitutionality of a statute under which the applicant has been convicted. The writ is, in fact, there stated to be the only remedy available for this purpose where the applicant has exhausted his remedy by appeal. Under California law, habeas corpus can also be used to raise other constitutional objections to criminal proceedings, such as deprivation of right to counsel. *In re Bell, supra,* 19 Cal. 2d, at 501, 122 P. 2d, at 30. The denial of petitioner's motion, therefore, rested on an adequate state ground, his choice of the wrong remedy under local law. *Woods* v. *Nierstheimer,* 328 U. S. 211, 214 (1946). This is not a case in which there is serious doubt about the nature of the ground on which the decision below rested. Cf. *State Commission* v. *Van Cott,* 306 U. S. 511 (1939); *Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940); *Herb* v. *Pitcairn,* 324 U. S. 117 (1945). We are thus without power

[4] See *People* v. *McDermott,* 97 Cal. 247, 32 P. 7 (1893), in which a motion to recall the remittitur of the State Supreme Court was denied, clearly on state grounds, under circumstances similar to those in the instant case.

to decide petitioner's claims on the merits, whatever may be their appeal. The writ was improvidently granted and must be dismissed. *Stembridge* v. *Georgia,* 343 U. S. 541 (1952).

It is so ordered.

MR. JUSTICE JACKSON concurs except that he thinks it is not material whether California will grant habeas corpus in this case. True, the petitioner's original appeal to the California court sought to raise a federal question. That was not passed upon because the appeal was dismissed for default. Whether the default should be considered excusable by any court is left highly in doubt by the record. At all events, in asking relief from it there was no claim that to take a default under such circumstances is forbidden to a state court by the Constitution of the United States, and such a claim would be frivolous if made. Hence, the petitioner is out of court for reasons of state law and practice, and the writ of certiorari should be dismissed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The petitioner was convicted of "vagrancy" in the Municipal Court of Los Angeles. He was given a 90-day jail sentence. The conviction for vagrancy was based primarily on what he had said in public speeches made in a Los Angeles park. He appealed to the Appellate Department of the Superior Court which was the highest court in California in which he could obtain review. One of a number of grounds of appeal was that the vagrancy statute was unconstitutional because vague and indefinite. The rules of the California appellate court specifically require that an appellant or his attorney of record shall be mailed notice of the date on which his appeal will be heard. California admits that

no such notice was given petitioner or his counsel of record on appeal and that neither knew the case was set for hearing. As a result neither was present when the case was called in the appellate court. Consequently that court affirmed the jail sentence by default without argument or consideration of the merits of the conviction or the constitutionality of the vagrancy statute. Immediately after discovery of this default affirmance petitioner moved to vacate the action. With full knowledge of all the foregoing facts, the appellate court denied the motion. Petitioner has thus had his constitutional contentions rejected and his conviction affirmed without notice and an opportunity to be heard through himself or counsel. In California, the right of appeal "is guaranteed by the Constitution to the prisoner, and is as sacred as the right of trial by jury. It is one of the means the law has provided to determine the question of his guilt or innocence." *Ex parte Hoge,* 48 Cal. 3, 6; *In re Albori,* 95 Cal. App. 42, 50–51, 272 P. 321, 324–325. Under these circumstances I agree with petitioner that refusal to give him or his counsel an opportunity to be heard in the appellate court denied him the due process of law guaranteed by the Fourteenth Amendment. See *In re Oliver,* 333 U. S. 257, 273; *Cole* v. *Arkansas,* 333 U. S. 196, 201; *Powell* v. *Alabama,* 287 U. S. 45, 68.[1] Such a denial of due process cannot be justified by the state on any "adequate non-federal ground." For this reason I would not dismiss the certiorari but would reverse or vacate the appellate court's judgment.

The Court rests its dismissal on a belief that the petitioner can still test the validity of his conviction in a

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[1] In *Cochran* v. *Kansas,* 316 U. S. 255, 258, we held that Kansas denied Cochran equal protection of the laws in refusing him privileges of appeal it afforded to others. To the same effect, *Doud* v. *United States,* 340 U. S. 206.

habeas corpus proceeding in the California state courts. And the Court's belief as to availability of a state remedy is buttressed by a presumption that a state will not deny a remedy for deprivation of a constitutional right such as here alleged. *Mooney* v. *Holohan, Warden,* 294 U. S. 103, 113. Moreover, should California refuse to grant petitioner a remedy to test the constitutionality of the Vagrancy Act, he could then seek relief in a United States district court. See *Moore* v. *Dempsey,* 261 U. S. 86. But my doubt about the availability of an adequate state remedy leads me to conclude that the wiser course here would be to vacate the appellate court's judgment for a clarification of the bases of its action. See *State Tax Commission* v. *Van Cott,* 306 U. S. 511; cf. *Herb* v. *Pitcairn,* 324 U. S. 117. For even superficial examination of the California vagrancy statute and petitioner's trial under it will reveal the gravity of the constitutional questions which petitioner urges and which the appellate court left unconsidered and undecided.

Subsection 5 of § 647 of the Penal Code of California provides that "Every idle, or lewd, or dissolute person, or associate of known thieves . . ." is a vagrant, punishable by fine of not more than $500 or by imprisonment of not more than six months, or both.[2] Petitioner was charged with and convicted only of being a "dissolute" person. The ambiguity and consequent broad reach of this crime of "dissoluteness" is patent. The trial court's efforts to reduce the ambiguity greatly increased it. The judge told the jury that petitioner was not accused of "any violation of any particular act" but with being a person of "a certain status" or "in a certain condition." His "character" alone was involved, since "vagrancy is a status

[2] A mere reading of the California vagrancy statute is sufficient to show its similarity to a New Jersey law held invalid for vagueness and ambiguity in *Lanzetta* v. *New Jersey,* 306 U. S. 451.

or a condition and it is not an act." Petitioner was therefore to be tried for a subjective "status," not the easiest thing in the world to prove or disprove. And petitioner's difficulty was not made easier by these additional statements to the jury:

> "Vagrancy is a continuing offense. It differs from most other offenses in the fact that it is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. One is guilty of being a vagrant at any time and place where he is found, so long as the character remains unchanged, although then and there innocent of any act demonstrating his character. . . . His character, as I said before, is the ultimate question for you to decide."

The dictionary definition of dissolute given to the jury by the court described a crime of such nebulous amplitude that no person could know how to defend himself. The court said:

> "Now, dissolute is defined as 'loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched.' Now, the word 'dissolute', as you see from this definition, covers many acts not necessarily confined to immorality. Other laxness and looseness and lawlessness may amount to dissoluteness."

During a nine-day trial the jury heard a number of witnesses who patently did not like what petitioner said in the many speeches he had been making in the park. There seems to be no doubt that his speeches chiefly involved political or economic questions and included attacks on the local police force. One witness who testified that petitioner had publicly accused him of being a thief also swore that he had heard petitioner advocate "force

and violence, stating that a change could not be brought about except by bullets." Other hostile witnesses testified to his use of intemperate language. A policeman swore that petitioner had prophesied that he "would not be given a fair trial"—a prophecy which I fear this record viewed as a whole does not entirely refute. There was also evidence that petitioner had solicited funds to aid him in carrying on his publicity work, and to help pay for his defense in numerous cases that were instituted against him in the municipal court. In one of these cases he had been charged with defacing a park bench of thick concrete by standing on it to make a speech.

It would seem a matter of supererogation to argue that the provision of this vagrancy statute on its face and as enforced against petitioner is too vague to meet the safeguarding standards of due process of law in this country. This would be true even were there no free speech question involved. And in that field we have said,

> "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment." *Winters* v. *New York,* 333 U. S. 507, 509.

The free speech question was so obviously involved in this vagrancy prosecution that the court charged the jury at length about free speech. He even submitted to them the question whether petitioner's speech constituted "a clear and present danger. . . ."

I adhere to the view that courts should be astute to examine and strike down dragnet legislation used to abridge public discussion of "views on political, social or economic questions." *Schneider* v. *State,* 308 U. S. 147, 161, 163.

SOUTH BUFFALO RAILWAY CO. *v.* AHERN ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 179. Argued December 17, 1952.—Decided January 19, 1953.

An employee of appellant railroad was injured while employed in interstate commerce. He applied for compensation under the New York Workmen's Compensation Law, § 113 of which permits the State Board to assume jurisdiction in cases arising out of interstate commerce only when the claimant, the employer and the insurance carrier waive their federal rights and remedies. Appellant did not object to the jurisdiction of the State Board and made payments of disability compensation for over four years under successive awards by that Board. After the employee's remedies under the Federal Employers' Liability Act had lapsed and the employee had died, appellant objected to a final award of disability compensation by the State Board on the ground that the state law was in conflict with the Federal Employers' Liability Act. *Held:*

1. Since the state court construed the state law as merely *permissive,* its grant of jurisdiction does not conflict with the federal act. Pp. 370–372.

2. In the circumstances of this case, appellant was estopped to deny liability under the state law. Pp. 372–373.

303 N. Y. 545, 104 N. E. 2d 898, affirmed.

The Appellate Division of the New York Supreme Court sustained an award of disability compensation to appellant's employee under the New York Workmen's Compensation Law. 277 App. Div. 1067, 100 N. Y. S. 2d 639. The New York Court of Appeals affirmed. 303 N. Y. 545, 104 N. E. 2d 898. On appeal to this Court, *affirmed,* p. 373.

Albert R. Connelly argued the cause for appellant. With him on the brief was *Joseph W. Marlow.*

Roy Wiedersum, Assistant Attorney General of New York, argued the cause for the New York State Work-

men's Compensation Board, appellee. With him on the brief were *Nathaniel L. Goldstein*, Attorney General, and *Wendell P. Brown*, Solicitor General.

MR. JUSTICE CLARK delivered the opinion of the Court.

Disability awards by the New York Workmen's Compensation Board to an interstate railroad employee precipitate this attack on § 113 of that state's Workmen's Compensation Law as unconstitutionally conflicting with the Federal Employers' Liability Act. While employed as a switchman by the appellant Railway, Thomas J. Ahern in July 1944 suffered a coronary occlusion as a result of unusual physical exertion in attempting to "throw a stuck switch" in the Railway's Lackawanna, New York, yards.[1] On January 15, 1945, he filed a claim with the New York Workmen's Compensation Board, asserting disability caused by injuries sustained in the regular course of his employment. The Railway controverted the claim solely on the grounds that his injuries were not in fact accidental, and that his disability was not causally related to the injuries alleged.[2] A referee, after hearing evidence, resolved these issues in the claimant's favor and in September 1945 awarded him compensation at the rate of $28 per week from the date of the accident. The Board denied the Railway's application for review and affirmed the referee's determination. In 1946 and the year following, the Board entered two further temporary disability awards. A self-insured employer, appellant in accordance with the Board's orders

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[1] See R. 4.

[2] R. 33, 37. In its "Notice to the Industrial Commissioner That Claim Will Be Controverted," appellant additionally reserved "the right to controvert for such other reasons as may later appear." R. 33. The New York courts attached no significance to that reservation.

and without appeal to the courts of the state continued biweekly payments to Ahern until December 20, 1948. On January 3, 1949, Ahern died of his heart condition. At a subsequent hearing held shortly thereafter to determine a final disability award, the widow, appellee here, was requested to file a death claim. At that point appellant for the first time disputed the Board's jurisdiction over the subject matter of the proceeding and offered to introduce proof in support.[3] The referee rejected appellant's proffer and rendered a disability award for the two weeks preceding Ahern's death. Over appellant's contention that the claimant was employed "in interstate commerce" so that the applicability of the Federal Employers' Liability Act deprived the Workmen's Compensation Board of jurisdiction, the Board denied a petition for review.[4] The Appellate Division of the State Supreme Court upheld the award, and the Court of Appeals affirmed.[5] This decision by the highest court of the state invoked § 113 of New York's Workmen's Compensation Law which in relevant part provides that awards "may be made by the board in respect of injuries subject to the admiralty or *other federal laws* in case the claimant, the employer and the insurance carrier waive their admiralty or *interstate commerce rights and remedies* . . . ." (Emphasis added.)[6] Appellant's serious attacks on the

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[3] R. 88–91.

[4] The Board found, in part, that appellant "by its conduct and the effect thereof on the rights of the deceased claimant . . . is now estopped from pleading the defense of the Federal Employer's Liability Act." R. 5.

[5] 303 N. Y. 545, 104 N. E. 2d 898 (1952), affirming 277 App. Div. 1067, 100 N. Y. S. 2d 639 (1950).

[6] "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States,

constitutionality of the statute as here applied and related problems important to the administration of the Federal Employers' Liability Act prompted us to note probable jurisdiction of this case.

Collision of New York's statute with the Federal Employers' Liability Act is the crux of appellant's constitutional contentions. All agree that the injured employee, had he pursued his federal remedy, would have met the "interstate commerce" requirements of that Act.[7] But we are told that, under the New York Court of Appeals' decision, § 113 of the state Workmen's Compensation Law may translate the mere payment and acceptance of a single interlocutory compensation award into an irrevocable agreement by employer and employee to forsake their federal rights and submit their controversy to the state Board, a tribunal not only without jurisdiction but whose rules of liability clash with the uniform scheme intended by Congress in the Federal Employers' Liability Act. That being so, appellant urges, the New York Court of Appeals' construction of § 113 unconstitutionally author-

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only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter." McKinney's N. Y. Laws, Workmen's Compensation Law, § 113.

[7] "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." 45 U. S. C. § 51.

izes the Workmen's Compensation Board to invade a field foreclosed by governing federal legislation.

We do not think that the Court of Appeals roved so far afield. Rather than coin sweeping generalities, the court held that New York *permitted* the Board to render compensatory awards for employees engaged in interstate commerce only if the parties voluntarily had so agreed and "if there has been no overreaching or fraud." [8] Accordingly, the court scrupulously traced the significant factual elements in this case: Appellant from the outset was represented by able counsel well versed in the nature of its liabilities toward injured employees; it utilized the Board's administrative machinery at several hearings resulting in at least four separate awards; it made payments for four and a half years in accordance with the Board's directions, choosing not to contest the authority of the Board; it sought no judicial relief from any award save the last, when the employee's remedy under the Federal Employers' Liability Act had lapsed. In view of these facts the court concluded that manifestly the parties had agreed to invoke § 113, a purely *"permissive* statute," [9] thereby empowering the Workmen's Compensation Board to act. And, in effect, appellant's course of conduct over the years estopped it from now asserting a flaw in the bargain: "we can conceive of no sound reason why the employer should be permitted to urge his Federal rights at this late date." [10]

We do not doubt that the Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act. State legislatures, for example, may not intrude into the

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[8] 303 N. Y., at 555, 104 N. E. 2d, at 904.

[9] 303 N. Y., at 555, 104 N. E. 2d, at 903.

[10] 303 N. Y., at 564, 104 N. E. 2d, at 909.

federal Act's interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the Act confers, or by compelling parties to elect between their federal remedies and an alternative state compensation plan. *Erie R. Co.* v. *Winfield,* 244 U. S. 170 (1917). The New York Court of Appeals, however, manifested meticulous care to avoid collision; it construed § 113 of the Workmen's Compensation Law as a mere legislative authorization, *permitting* the Board to effectuate private agreements for compromising a federal controversy by resort to an impartial local umpire—"that is all that section 113 of the Workmen's Compensation Law purports to accomplish." [11] The difference between coercion and permission is decisive; New York's jurisdictional grant, so confined, does not transgress.

To be sure, peculiarities of local law may not gnaw at rights rooted in federal legislation. *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 21 (1923); *Davis* v. *Wechsler,* 263 U. S. 22, 24 (1923). Untainted by fraud or overreaching, full and fair compromises of FELA claims do not clash with the policy of the Act. *Callen* v. *Pennsylvania R. Co.,* 332 U. S. 625 (1948). The validity of such an agreement, however, raises a federal question to be resolved by federal law. *Dice* v. *Akron, C. & Y. R. Co.,* 342 U. S. 359 (1952); cf. *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239 (1942).[12] And, mindful of the benevolent aims of the Act, we have jealously scrutinized

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[11] 303 N. Y., at 555, 104 N. E. 2d, at 904.

[12] See also *Heagney* v. *Brooklyn Eastern District Terminal,* 190 F. 2d 976, 978 (1951); *Ricketts* v. *Pennsylvania R. Co.,* 153 F. 2d 757, 759 (1946). We need not now decide whether the systematic solicitation of such agreements would run afoul of § 5 of the Federal Employers' Liability Act. "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U. S. C. § 55.

private arrangements for the bartering away of federal rights. *Ibid.; Boyd* v. *Grand Trunk Western R. Co.,* 338 U. S. 263 (1949); *Duncan* v. *Thompson,* 315 U. S. 1 (1942).[13] Here, however, whether motivated by charity, dislike of litigation, or trial strategy, appellant made payments until the statute of limitations barred the employee's federal claim. Fully advised of its legal rights it submitted the controversy to the Board. The New York Court of Appeals viewed these circumstances as estopping appellant from the assertion of so long delayed a change of heart. No tenet of federal law compels otherwise.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

This judgment cannot be sustained on the ground that the parties were merely using the good offices of the New York Workmen's Compensation Board to compromise a claim under the Federal Employers' Liability Act. No such claim was ever asserted. The claim made charged no negligence. And no such issue was ever tendered. Yet without negligence, there is no liability under the federal Act. Moreover, this does not appear to be a situation where a claim, contested under the federal Act, is compromised, the standards of a state Act being used as the basis for the settlement. Cf. *Bay State Co.* v. *Porter,* 153 F. 2d 827; *Heagney* v. *Brooklyn Eastern D. Terminal,* 190 F. 2d 976. This claim seems to be founded on "accident" rather than on "negligence." And the claimant apparently sought relief under the New York Act because he had none under the federal Act.

But the judgment cannot be affirmed as a settlement of litigation under the New York Act. The Court held in *New York Central R. Co.* v. *Winfield,* 244 U. S. 147, that

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[13] See *Purvis* v. *Pennsylvania R. Co.,* 198 F. 2d 631 (1952).

the remedy for personal injuries suffered by employees of interstate railroad carriers is regulated both inclusively and exclusively by the federal Act, that no room is left for state regulation, that even though the injury on which the claim is based is not attributable to negligence and therefore may not be compensated for under the federal Act, nevertheless a state may not afford a remedy. The Court held that the federal Act supplanted the state acts and established one exclusive standard of liability for interstate railroad carriers. And see *Erie R. Co.* v. *Winfield,* 244 U. S. 170, 172.

Therefore, by reason of the Supremacy Clause, a state has no power to adopt a different standard of liability for these personal injuries. It may neither force nor permit the carriers or the employees to settle these personal injury claims on a different basis than the federal Act supplies. Since the New York legislature is constitutionally barred from vesting its Workmen's Compensation Board and its courts with jurisdiction over the claim, I fail to see how they can acquire jurisdiction through consent of the parties. No waiver, consent, or estoppel should be allowed to enlarge the state domain at the expense of the overriding federal policy. Cf. *United States* v. *Corrick,* 298 U. S. 435, 440.

Mr. Justice Brandeis dissented in *New York Central R. Co.* v. *Winfield,* 244 U. S. 147, 154, in an opinion in which Mr. Justice Clarke concurred. Under his view the federal Act does not preclude a state from adding to a carrier's liability for negligence, a liability based on accident. His view is the one I would follow; and I would join four in overruling the *Winfield* cases. But they are still the law; and their holdings are in my view quite inconsistent with what the Court now does.

NATIONAL LABOR RELATIONS BOARD *v.* DANT ET AL., DOING BUSINESS AS DANT & RUSSELL, LTD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 97. Argued December 15, 1952.—Decided February 2, 1953.

Section 9 (h) of the National Labor Relations Act, as amended, does not preclude issuance by the National Labor Relations Board of an unfair-labor-practice complaint under § 10 (c) after the required non-Communist affidavits have been filed—even though they had not been filed when the union filed the charge with the Board under § 10 (b). Pp. 376–385.

195 F. 2d 299, reversed.

On the ground that § 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, had not been complied with, the Court of Appeals set aside an order of the National Labor Relations Board requiring an employer to cease and desist from unfair labor practices in violation of § 8 (a)(1) and (3). 195 F. 2d 299. This Court granted certiorari. 344 U. S. 811. *Reversed,* p. 385.

David P. Findling argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, George J. Bott* and *Mozart G. Ratner.*

John T. Casey argued the cause for respondents. With him on the brief were *R. S. Smethurst* and *R. S. Haslam.*

Arthur J. Goldberg and *Thomas E. Harris* filed a brief for the Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

An *amici curiae* brief urging affirmance was filed by *Rufus G. Poole* for the Shell Chemical Corporation, *Frank A. Constangy* for the American Thread Company,

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J. Adrian Rosenburg for Jack Smith Beverages, Inc., *Edward F. Conlin* for Edwards Brothers, Inc., and *Alexander E. Wilson, Jr.* and *G. Maynard Smith* for the I. B. S. Manufacturing Company.

MR. JUSTICE REED delivered the opinion of the Court.

The National Labor Relations Board issued a complaint on March 27, 1950, following a charge filed August 3, 1949, by the International Woodworkers of America, Local 6–7, against respondent, Dant & Russell, Ltd. The charge was filed in accordance with the procedure of the Act, § 10 (b), and was based on violations of § 8 (a)(1) and (3).[1] After the usual proceedings, the Board ordered respondent to take appropriate remedial action to correct the charged unfair labor practices. The International Woodworkers Union was and is an affiliate of the Congress of Industrial Organizations. There were on file with the Board at the time the charge was made the non-Communist affidavits executed by the officers of the local union as required by § 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, § 101. Affidavits executed by

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[1] National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, 29 U. S. C. § 158:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, ..."

29 U. S. C. § 160:

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board . . . ."

the officers of the C. I. O. were filed with the Board prior to the issuance of the complaint but subsequent to the filing of the charge.

Section 9 (h) of the Act provided, at the time of the filing of the charge and the issuance of the complaint, that

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed . . . by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate . . . that he is not a member of the Communist Party . . . ." [2]

Respondent challenged the order on the ground that the Board could not issue a valid complaint based on a charge by a union if the charging union was not in compliance with § 9 (h) when the charge was filed in spite of the fact that at the time the complaint was issued, the union was in full compliance. In response to this challenge, the Board held that § 9 (h) required compliance "at the time of the issuance of the complaint, rather than at the time of the filing of the charge." On petition for enforcement, the Court of Appeals for the Ninth Circuit set aside the order on the single ground that, under § 9 (h), "the Board was not empowered to entertain the

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[2] Section 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, 61 Stat. 146, 29 U. S. C. (Supp. III) § 159 (h).

The clause "no petition under section 9 (e)(1) shall be entertained" was deleted by Act of October 22, 1951, 65 Stat. 601.

charge or to issue the complaint or the order." [3] This followed, according to the court, because our decision in *Labor Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, had construed § 9 (h) as prohibiting the issuance of any complaint by the Board unless the charging labor organization was in full compliance at the time its charge was filed.

We do not think the *Highland Park* opinion supports the Court of Appeals opinion in the present case. That former opinion, dealing with a charge that the employer violated § 8 (a)(5) by refusing to bargain with the bargaining agent of the employees, § 9 (a),[4] held only that the C. I. O. was a "national or international labor organization" within the meaning of § 9 (h). For that reason the C. I. O. was required to file non-Communist affidavits as a prerequisite to the achievement of full compliance status by its affiliates. There, the C. I. O.'s compliance with § 9 (h) occurred almost a year after the complaint had issued. Since compliance subsequent to the issuance of the complaint also occurred in the other decisions relied on by the court below, language in them concerning the institution of proceedings was not directed at charges under § 8 (a)(3) and therefore there was no occasion for those courts to analyze § 9 (h) to determine its applicability to the present situation.[5]

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[3] 195 F. 2d 299, 300. The Courts of Appeals for the Third and Fifth Circuits have taken similar positions where the affidavits were filed prior to the issuance of the complaints in *Labor Board* v. *Nina Dye Works Co., Inc.*, 198 F. 2d 362; and *Labor Board* v. *American Thread Co.*, 198 F. 2d 137, respectively. Each of these cases agreed with the analysis and conclusion of the Court of Appeals for the Ninth Circuit in the present case. See judgment of this Court reversing these decisions entered today, *post*, p. 924.

[4] 84 N. L. R. B. 744, 745.

[5] *Labor Board* v. *Postex Cotton Mills*, 181 F. 2d 919; *Labor Board* v. *J. I. Case Co.*, 189 F. 2d 599; *Labor Board* v. *Clark Shoe Co.*, 189 F. 2d 731.

In respondent's view, and in the view of the Courts of Appeals that have considered this issue, § 9 (h) precludes noncomplying unions from filing "valid" charges, and prohibits the Board from taking any action on a charge filed by a noncomplying union. We do not agree. Section 9 (h) prohibited the Board from doing three things. It specifically stated that "unless" the prerequisite affidavits had been filed, the Board shall not (1) make an "investigation" as authorized by § 9 (c) concerning the representation of employees; (2) entertain a "petition under section 9 (e)(1)," as it then stood; or (3) issue a "complaint . . . pursuant to a charge made by a labor organization under subsection (b) of section 10." It does not by its terms preclude either the filing of a charge by a noncomplying labor organization or the entertainment of the charge by the Board.

The "unless" clause limits the issuance of a "complaint." It has no specific reference to the phrase "pursuant to a charge made by a labor organization." If Congress had intended to enact such a requirement for the filing of the charge, it would have been a simple matter to have stated that "no charge shall be entertained." [6] We think the purpose of the "pursuant" phrase is to make it clear that the "unless" limitation on the issuance of complaints is restricted to charges filed by such labor organizations and does not apply to charges filed by individuals, or by employers against such organizations. The phrase so construed follows the pattern of the first phrase in § 9 (h) which applies to proceedings by employees for collective bargaining representation "raised by a labor organization under subsection (c) of this section." That there is no such qualifying clause in § 9 (h) for the union-shop election clause provision of § 9 (e)(1), as it then

[6] See S. 655, 83d Cong., 1st Sess., introduced by Senator Taft to amend § 9 (h) by forbidding entertainment by the Board of a charge under § 10 (b) unless the required affidavits are filed.

read, is in accord with this construction, for all petitions for such an election would then have been filed on behalf of a union.

The requirements for non-Communist affidavits in § 9 (h) make it unlawful for the Board to investigate a petition by a labor organization under § 9 (c) for collective bargaining representation. Likewise the absence of such affidavits kept the Board from entertaining a petition for a union-shop election under § 9 (e)(1). The careful specification in § 9 (h) that these affidavits must be filed before investigation, entertainment or complaint shows that § 9 (h) was not directed at the filing of a charge. Such particularity distinguishes between charge and complaint.

This has been the position of the Board from the enactment of the Labor Management Relations Act. Section 102.13 (b)(2) of the Board's Rules and Regulations, effective August 18, 1948, defines compliance with § 9 (h) of the Act in terms of requiring the affidavits to be "executed contemporaneously with the charge (or petition)." [7]

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[7] 29 CFR § 102.13:

"(b) For the purpose of the regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

. . . . .

"(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

This, however, is a direction as to what should be done and is not an interpretation by the Board of the requirement of § 9 (h). According to § 102.13 (b), the definition of compliance is set down, "For the purpose of the regulations in this part." The Board had made it clear in § 101.3 of these Rules that there is a 10-day period of grace given to charging unions to achieve compliance status.[8] The Board states it has followed a practice of extending this period upon a proper showing that the union is making a diligent effort to comply.[9] An interpretation that the Act permits the filing of a charge prior to compliance with § 9 (h) is the same as that made by

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[8] 29 CFR § 101.3:

"(b) In addition, the labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9 (h) of the act as follows: At the time of filing the charge (or petition) or prior thereto, or within a reasonable period not to exceed 10 days thereafter, the national or international labor organization shall have on file with the general counsel in Washington, D. C., and the local labor organization shall have on file with the regional director in the region in which the proceeding is pending, or in which it customarily files cases, a declaration by an authorized agent executed contemporaneously or within the preceding 12-month period listing the titles of all offices of the filing organization and stating the names of the incumbents, if any, in each such office and the date of expiration of each incumbent's term, and an affidavit from each such officer, executed contemporaneously or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party and that he does not believe in, and is not a member of nor supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

[9] Respondent asserts that this practice, which was followed by the Board in this case, contravenes § 3 of the Administrative Procedure Act. That section requires every agency to publish in the Federal Register "statements of the general course and method by which its functions are channeled and determined, including the nature and requirement of all formal or informal procedures available," and

the Board in an opinion as early as December 16, 1948, *In the Matter of Southern Fruit Distributors,* 80 N. L. R. B. 1283. That opinion was handed down by the Board before our ruling in the *Highland Park* case and the position has been maintained, though the Board failed to set out fully in its opinions the reason for its conclusion.[10]

Respondent urges that the above construction of § 9 (h) weakens the over-all purpose of the section in that it allows the Board to provide noncomplying labor organizations with substantial benefits by the filing of the charge without any assurance of compliance.

Phrased differently, the argument is that the benefits of the Act may not flow to a labor organization unless the non-Communist affidavits are on file. We agree with the argument, and believe that it is in accord with our interpretation of § 9 (h). Since the remedial processes of the Act to cure practices forbidden by § 8 (a)(3) can only be invoked by the issuance of a complaint, we do not see how a noncomplying labor organization can be said to benefit from the fact that it need not be in compliance at the date of the filing of the charge. The filing of a charge, which is subject to dismissal within 10 days under the Board's rule, unless reasonable assurance is given by the filing union that it will comply with the affidavit requirement,[11] is of no benefit to the charging union unless it is followed by the issuance of a complaint.

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provides that "[n]o person shall in any manner be required to resort to organization or procedure not so published." 5 U. S. C. § 1002 (a). The Board's practice of extending the 10-day period on a proper showing by the labor organization can hardly be called a procedure to which respondent was required to resort.

[10] *In the Matter of H & H Manufacturing Co., Inc.,* 87 N. L. R. B. 1373. Compare a contrary position taken by the Third Circuit in *Labor Board* v. *Nina Dye Works Co., Inc.,* 198 F. 2d 362.

[11] N. L. R. B. Rules and Regulations and Statement of Procedure, 29 CFR §§ 101.3 and 102.13.

Absent the issuance of a complaint, the filing of a charge is a useless act.

Another factor militating against the construction of the Act adopted below arises out of the fluid and elective nature of the official personnel of labor unions. As a practical matter, elections of new officers, changes in organizational structures, difficulties and delays in auditing financial statements or in obtaining information with respect to the numerous details which § 9 (f) and (g) requires, make compliance at a given moment, or continuous compliance, a matter of happenstance. Under § 9 (f) and (g) the filing of union financial and organizational reports is also a condition precedent to the issuance of complaints under subsection (b) of § 10 of the Act. It would seem that the construction of § 9 (h) urged by respondent would lead to a like construction of § 9 (f) and (g).[12] Such normal noncompliance at the time of filing a charge should not work to frustrate the

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[12] 29 U. S. C. § 159:

"(f) . . . No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b), of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing— . . . .

"(g) . . . It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B) of this section. No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section

Act's purpose of remedying unfair labor practices committed against unions which do have leadership willing to comply.

Finally, respondent makes the argument that its position is supported by the legislative history of § 9 (h).[13] But in the face of the specific words of the statute, the

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160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection."

[13] The House Conference Report No. 510, 80th Cong., 1st Sess., p. 46, speaks of the filing of the required data as a condition to the labor organization's receiving "benefits under the act." To the same effect see the analysis of the Act at 93 Cong. Rec. 6534. Senator Taft, in analyzing the differences between the Senate bill and the Conference Report, stated: "Subsection 9 (h) of the conference agreement embodies the principle . . . which would have prevented a labor organization from being eligible for certification if any of its . . . officers were members or affiliates of the Communist Party . . . . There was a similar provision in the House bill . . . . In reconciling the two provisions the conferees took into account the fact that representation proceedings might be indefinitely delayed if the Board was required to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation. The conference agreement provides that no certification shall be made or any complaint issued unless the labor organization in question submits affidavits executed by each of its officers . . . to the effect that they are not members or affiliates" of organizations accepting the doctrine of violence in government. 93 Cong. Rec. 6444.

Referring to subsections 9 (f) and (g), containing provisions regarding financial reports, similar to those of § 9 (h), Senator Taft stated that "[t]he filing of such report is a condition of certification as bargaining agent under the law, and is also a condition of the right to file any charges under the . . . Act." 93 Cong. Rec. 3839. Congressman Hartley's remarks were that the section "prohibits labor organizations from invoking the processes of the act unless all of the officers file affidavits with the board that they are not members of the Communist Party . . . ." 93 Cong. Rec. 6383. In the House Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 51–52, it was stated

legislative history does not persuade us. It contains no discussion of the necessity of filing § 9 (h) affidavits before filing the charge. The purpose of § 9 (h) was to stop the use of the Labor Board by union leaders unwilling to be limited in government by the processes of reason. That purpose was sought through the elimination of such leaders rather than by making difficult the union's compliance with the Act. The legislative comments are to be read in that light. Indeed those comments are so lacking in definitiveness on the point here at issue that both parties suggest that § 9 (h) itself best shows the purpose of Congress.

We hold that the sought-for congressional intent is found in the language of the Act; and as we have found it, the decision below must be reversed.

Reversed.

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that the bill which was enacted made several changes with respect to § 9 (f) and (g). "*First,* the filing of the information and reports is made a condition . . . to eligibility for filing petitions for representation and eligibility for making changes." To the same effect see also the subsequent statement of Congressman Hartley, in his book, "Our New National Labor Policy," at pp. 162–163.

DE LA RAMA STEAMSHIP CO., INC. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 368. Argued January 15, 1953.—Decided February 2, 1953.

Petitioner brought a suit in admiralty in a Federal District Court against the United States to recover under a war risk policy issued under the War Risk Insurance Act of 1940, as amended, for the loss of a ship by enemy action; but the case had not been reached for trial when that Act was repealed by the Joint Resolution of July 25, 1947. *Held:* The District Court was not deprived of jurisdiction, since existing rights and remedies were preserved by the General Savings Statute, R. S. § 13, now 1 U. S. C. § 109. Pp. 386–391.

198 F. 2d 182, reversed.

In a suit in admiralty against the United States, the District Court entered a final decree for the libellant. 98 F. Supp. 514. The Court of Appeals reversed. 198 F. 2d 182. This Court granted certiorari. 344 U. S. 883. *Reversed,* p. 391.

Harold M. Kennedy argued the cause for petitioner. With him on the brief were *Roscoe H. Hupper, Norman M. Barron* and *Hervey C. Allen.*

Benjamin Forman argued the cause for the United States. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Baldridge, Samuel D. Slade, Hubert H. Margolies* and *Cornelius J. Peck.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit in admiralty against the United States, in which the libellant, petitioner here, sought to recover for its loss of the *M. V. Dona Aurora,* which was sunk

by enemy action on December 25, 1942. The basis of the libel was a war risk policy issued by the War Shipping Administration under the War Risk Insurance Act of June 29, 1940, 54 Stat. 689, 690, as amended, 46 U. S. C. § 1128d. The libel was filed on December 22, 1944. On July 25, 1947, Congress passed a Joint Resolution putting an end to a large body of war powers. Among the hundred-odd statutory provisions thus repealed was the War Risk Insurance Act. 61 Stat. 449, 450. On October 4, 1948, determination of damages in advance of trial was referred to a Commissioner; his report was filed on March 23, 1950; it was confirmed (subject to some exceptions) on July 27, 1950, 92 F. Supp. 243; the case was reached for trial on March 6, 1951. The Government for the first time then raised the jurisdictional issue on which this case turns here, namely, whether the District Court had, as of July 25, 1947, been deprived of jurisdiction to retain this suit by the Joint Resolution.

The District Court rejected the Government's contention, holding that § 13 of the Revised Statutes, as amended,* saved the libellant's cause of action from being extinguished by the Joint Resolution of July 25, 1947. The court properly called attention to the fact that § 13, originally § 4 of the Act of February 25, 1871, 16 Stat.

*"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

431, 432, was reenacted, as amended, 58 Stat. 118, as 1 U. S. C. (Supp. I) § 109, 61 Stat. 633, 635, after passage of the Joint Resolution, to wit, on July 30, 1947. 98 F. Supp. 514. However, the Government's view prevailed in the Court of Appeals. That court held that "the district court on July 25, 1947 lost its power to deal further with the litigation." 198 F. 2d 182, 186. The Government recognized the importance of this ruling, and we brought the case here, limiting our grant of certiorari to the question of the jurisdiction of the District Court. 344 U. S. 883.

The precise contention which the Government made in the Court of Appeals, and which prevailed there, goes a long way toward disposing of itself. The Government did not contend that its liability to the petitioner came to an end with the Joint Resolution's repeal of the War Risk Insurance Act. Apart from R. S. § 13, the Constitution precludes extinction of the Government's liability. *Lynch* v. *United States,* 292 U. S. 571. The Government realized that its liability under the War Risk Insurance Act survived the Joint Resolution, but claimed that the mode provided by the Act for its enforcement did not. In this Court, the Government receded even from that position. It here took the academic position of giving the arguments *pro* and *con,* of stating the reasons why R. S. § 13, the General Savings Statute, now 1 U. S. C. (Supp. I) § 109, should be held to govern this situation, and also the reasons why it should be held inapplicable. We find the latter considerations more subtle than persuasive, and conclude that the arguments urged in support of the continuing jurisdiction of district courts to hear causes of action which arose under the War Risk Insurance Act prior to its repeal must prevail.

In dealing with the present problem it is idle to thresh over the old disputation as to when the Government is, and when the Government is not, bound by a statute un-

restricted in its terms. R. S. § 13, as reenacted, lays down a general rule regarding the implications for existing rights of the repeal of the law which created them. It embodies a principle of fair dealing. When the Government has entered upon a conventional commercial endeavor, such as the insurance business, it as much offends standards of fairness for it to violate the principle of R. S. § 13 as for private enterprise to do so.

This brings us to the crux of the contention which prevailed below, namely, that while the Government's obligation as an insurer, which came into being with the sinking of the *Dona Aurora* on December 25, 1942, survived the repeal of the War Risk Insurance Act by the Joint Resolution of 1947, the "liability" could be enforced only in the Court of Claims, not in the District Court. This conclusion is no more substantial than the tenuous bits of legal reasoning of which it is compounded.

By the General Savings Statute Congress did not merely save from extinction a liability incurred under the repealed statute; it saved the statute itself:

> "and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability."

We see no reason why a careful provision of Congress, keeping a repealed statute alive for a precise purpose, should not be respected when doing so will attain exactly that purpose.

This case demonstrates the concrete, dollars-and-cents importance of saving the statute and not merely the liability. Indeed, in this case the liability under the statute is not wholly saved unless that portion of the statute which gives the District Court jurisdiction also survives. As the Government fairly points out, to deny petitioner the opportunity to enforce its right in admiralty and

to send it to the Court of Claims instead is to diminish substantially the recoverable amount, since in a district court sitting in admiralty interest accrues from the time of filing suit, 46 U. S. C. § 745, while in the Court of Claims interest does not begin to run until the entry of judgment. 28 U. S. C. (Supp. IV) § 2516.

For the Government to acknowledge the liability but to deny the full extent of its enforceability recalls what was said in *The Western Maid,* 257 U. S. 419, 433: "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."

The Government rightly points to the difference between the repeal of statutes solely jurisdictional in their scope and the repeal of statutes which create rights and also prescribe how the rights are to be vindicated. In the latter statutes, "substantive" and "procedural" are not disparate categories; they are fused components of the expression of a policy. When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. *Ex parte McCardle,* 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are *Hallowell* v. *Commons,* 239 U. S. 506, and *Bruner* v. *United States,* 343 U. S. 112. If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit. But where the object of Congress was to destroy rights in the future while saving those which have accrued, to strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and hence to defeat rather than further the legislative purpose. The Government acknowledges that there were special considerations, apart from the matter of interest, for giving the insured under

the War Risk Insurance Act access to the district courts rather than relegating him to the Court of Claims. In repealing the War Risk Insurance Act among numerous other statutes, Congress was concerned not with jurisdiction, not with the undesirability of the district courts and the suitability of the Court of Claims as a forum for suits under that Act. It was concerned with terminating war powers after the "shooting war" had terminated.

While the Government took a neutral position in this Court on the survival of the District Court's jurisdiction under the War Risk Insurance Act, it emphatically urged us to hold that, in any event, the repeal of that Act did not extinguish the District Court's jurisdiction to hear this case, sitting in admiralty pursuant to the Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. § 741 *et seq.* Since we have concluded that the District Court was correct in holding that this libel was properly before it under the War Risk Insurance Act, it would be superfluous to consider the applicability of the other statute.

Reversed.

MR. JUSTICE DOUGLAS concurs in the result.

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FEDERAL TRADE COMMISSION *v.* MOTION PICTURE ADVERTISING SERVICE CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 75. Argued December 8, 1952.—Decided February 2, 1953.

1. Respondent produces advertising motion pictures and distributes them in interstate commerce. It had exclusive contracts with 40% of the theatres which exhibit such films in the area where it operates. It and three other companies had exclusive contracts with 75% of such theatres in the United States. The Federal Trade Commission found, upon substantial evidence, that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly, and that their use was an "unfair method of competition" in violation of § 5 of the Federal Trade Commission Act. It issued an order prohibiting respondent from entering into any such exclusive contract for more than a year or from continuing in effect any exclusive provision of an existing contract longer than a year after service of the order. *Held:* The order is sustained. Pp. 393–397.

   (a) The Commission did not exceed the limits of its allowable judgment in restricting the exclusive contracts to one-year terms. Pp. 395–396.

2. A plea of *res judicata* to the present proceeding of the Commission, based on a former proceeding which was directed at a conspiracy between respondent and other distributors involving the use of exclusive agreements, cannot be sustained, since the present proceeding charges no conspiracy and the issues litigated and determined are not the same as those in the earlier one. Pp. 397–398.

194 F. 2d 633, reversed.

In a proceeding upon a complaint charging "unfair methods of competition" in violation of § 5 of the Federal Trade Commission Act, the Commission entered a cease and desist order against respondent. 47 F. T. C. 378. The Court of Appeals reversed. 194 F. 2d 633. This Court granted certiorari. 344 U. S. 811. *Reversed,* p. 398.

James L. Morrisson argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp, Charles H. Weston* and *W. T. Kelley.*

Louis L. Rosen argued the cause for respondent. With him on the brief were *Charles Rosen* and *William B. Cozad.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent is a producer and distributor of advertising motion pictures which depict and describe commodities offered for sale by commercial establishments. Respondent contracts with theatre owners for the display of these advertising films and ships the films from its place of business in Louisiana to theatres in twenty-seven states and the District of Columbia. These contracts run for terms up to five years, the majority being for one or two years. A substantial number of them contain a provision that the theatre owner will display only advertising films furnished by respondent, with the exception of films for charities or for governmental organizations, or announcements of coming attractions. Respondent and three other companies in the same business (against which proceedings were also brought) together had exclusive arrangements for advertising films with approximately three-fourths of the total number of theatres in the United States which display advertising films for compensation. Respondent had exclusive contracts with almost 40 percent of the theatres in the area where it operates.

The Federal Trade Commission, the petitioner, filed a complaint charging respondent with the use of "unfair methods of competition" in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 717, 719, 52 Stat.

111, 15 U. S. C. § 45. The Commission found that respondent was in substantial competition with other companies engaged in the business of distributing advertising films, that its exclusive contracts have limited the outlets for films of competitors and have forced some competitors out of business because of their inability to obtain outlets for their advertising films. It held by a divided vote that the exclusive contracts are unduly restrictive of competition when they extend for periods in excess of one year. It accordingly entered a cease and desist order which prohibits respondent from entering into any such contract that grants an exclusive privilege for more than a year or from continuing in effect any exclusive provision of an existing contract longer than a year after the date of service in the Commission's order.[1] 47 F. T. C. 378. The Court of Appeals reversed, holding that the exclusive contracts are not unfair methods of competition and that their prohibition would not be in the public interest. 194 F. 2d 633.

The "unfair methods of competition," which are condemned by § 5 (a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.*, pp. 310–312. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act (see *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441, 453)—to stop in their incipiency acts and practices which, when full blown,

[1] Comparable findings and like orders were entered in each of the three companion cases. *In the Matter of Reid H. Ray Film Industries*, 47 F. T. C. 326; *In the Matter of Alexander Film Co.*, 47 F. T. C. 345; *In the Matter of United Film Ad Service, Inc.*, 47 F. T. C. 362.

would violate those Acts (see *Fashion Guild* v. *Federal Trade Commission,* 312 U. S. 457, 463, 466), as well as to condemn as "unfair methods of competition" existing violations of them. See *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 691.

The Commission found in the present case that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly. Those findings are supported by substantial evidence. This is not a situation where by the nature of the market there is room for newcomers, irrespective of the existing restrictive practices. The number of outlets for the films is quite limited. And due to the exclusive contracts, respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets for this business throughout the United States. It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an "unfair method of competition" within the meaning of § 5 (a) of the Federal Trade Commission Act.

An attack is made on that part of the order which restricts the exclusive contracts to one-year terms. It is argued that one-year contracts will not be practicable. It is said that the expenses of securing these screening contracts do not warrant one-year agreements, that investment of capital in the business would not be justified without assurance of a market for more than one year, that theatres frequently demand guarantees for more than a year or otherwise refuse to exhibit advertising films. These and other business requirements are the basis of the argument that exclusive contracts of a duration in excess of a year are necessary for the conduct of the business of the distributors. The Commission considered this argument and concluded that, although the exclusive contracts were beneficial to the distributor and preferred

by the theatre owners, their use should be restricted in the public interest. The Commission found that the term of one year had become a standard practice and that the continuance of exclusive contracts so limited would not be an undue restraint upon competition, in view of the compelling business reasons for some exclusive arrangement.[2] The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes "unfair" within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question. Certainly we cannot say that exclusive contracts in this field should have been banned in their entirety or not at all, that the Commission exceeded the limits of its allowable judgment (see *Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 612; *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 726–727) in limiting their term to one year.[3]

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[2] The Commission said: "Under the general practice the representative of the respondent first contacts the theater to determine if space is available for screen advertising and makes such arrangements as conditions warrant with respect to such space. In this way respondent's representative is able to show prospective advertisers where space is available. In contacting the theater it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since film advertising space in theaters is limited to four, five, or six advertisements, it is not unreasonable for respondent to contract for all space available in such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

"It is therefore the conclusion of the Commission in the circumstances here that an exclusive screening agreement for a period of 1 year is not an undue restraint upon competition." 47 F. T. C., at 389.

[3] A suggestion is made that respondent needs a period longer than one year in view of the fact that the contracts with advertisers are often not coterminous with the exclusive screening agreements, due

The Court of Appeals held that the contracts between respondent and the theatres were contracts of agency and therefore governed by *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568. This was on the theory that respondent furnishes the films by bailment to the exhibitors in exchange for a contract for personal services which the exhibitors undertake to perform. But the *Curtis* case would be relevant here only if § 3 of the Clayton Act [4] were involved. The vice of the exclusive contract in this particular field is in its tendency to restrain competition and to develop a monopoly in violation of the Sherman Act. And when the Sherman Act is involved the crucial fact is the impact of the particular practice on competition, not the label that it carries. See *United States* v. *Masonite Corp.*, 316 U. S. 265, 280.

Finally, respondent urges that the sole issue raised in the Commission's complaint had been adjudicated in a former proceeding instituted by the Commission which resulted in a cease and desist order. 36 F. T. C. 957.

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in large part to the delays in obtaining advertising contracts after the exclusive screening agreements have been executed. The Commission rejected this contention, stating that by custom and by the terms of the exclusive contracts the theatre completes the screening of advertisements as required by the advertising contracts, even though those contracts extend beyond the expiration date of the exclusive screening agreement. We have concluded that the order which the Commission entered in this case is consistent with that construction. It does not prevent the completion of any particular advertising contract after the expiration of the exclusive screening agreement. The order merely prevents respondent from requiring the theatre owner to show only its films after that date. It does not prevent the theatre owner from making an otherwise exclusive agreement with another distributor at that time. No theatre owner is a party to this proceeding. The cease and desist order binds only respondent.

[4] This section makes unlawful a lease, sale, or contract for sale which substantially lessens competition or tends to create a monopoly. 15 U. S. C. § 14.

But that was a proceeding to put an end to a conspiracy between respondent and other distributors involving the use of these exclusive agreements. The present proceeding charges no conspiracy; it is directed against individual acts of respondent. The plea of *res judicata* is therefore not available since the issues litigated and determined in the present case are not the same as those in the earlier one. Cf. *Tait* v. *Western Maryland R. Co.*, 289 U. S. 620, 623.

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON joins, dissenting.

My doubts that the Commission has adequately shown that it has been guided by relevant criteria in dealing with its findings under § 5 of the Federal Trade Commission Act are dispelled neither by those findings nor by the opinion of the Court. The Commission has not explained its conclusion with the "simplicity and clearness" necessary to tell us "what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510, 511.

My primary concern is that the Commission has not related its analysis of this industry to the standards of illegality in § 5 with sufficient clarity to enable this Court to review the order. Although we are told that respondent and three other companies have exclusive exhibition contracts with three-quarters of the theaters in the country that accept advertising, there are no findings indicating how many of these contracts extend beyond the one-year period which the Commission finds not unduly restrictive. We do have an indication from the record that more than half of respondent's exclusive contracts run for only one year; if that is so, that part of respondent's hold on the market found unreasonable by the

Commission boils down to exclusion of other competitors from something like 1,250 theaters, or about 6%, of the some 20,000 theaters in the country. The hold is on about 10% of the theaters that accept advertising.

Apart from uncritical citations in the brief here,[1] the Commission merely states a dogmatic conclusion that the use of these contracts constitutes an "unreasonable restraint and restriction of competition." *In re Motion Picture Advertising Service Co.*, 47 F. T. C. 378, 389. The Court's opinion is merely an echo of this conclusion and states without discussion that such exclusion from a market without more "falls within the prohibitions of the Sherman Act" because, taken with exclusive contracts of other competitors, 75% of the market is shut off. But there is no reliance here on conspiracy or concerted action to foreclose the market, a charge that would of course warrant action under the Sherman Law. Indeed, we must assume that respondent and the other three companies are complying with an earlier order of the Commission directed at concerted action. See *In re Screen Broadcast Corp.*, 36 F. T. C. 957. While the existence of the other exclusive contracts is, of course,

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[1] The decisions of this Court relied on do not dispose of this case. In *International Salt Co.* v. *United States*, 332 U. S. 392, we dealt with the largest producer of salt for industrial purposes, who by means of tying agreements rather than exclusive contracts, attempted an undue extension of his patent monopoly. Apart from these differences, it deserves to be noted that salt sales in one year amounted to $500,000 by the patentee. To the extent that that decision is predicated on a Sherman Law violation, it seems inapplicable here. In *United States* v. *Yellow Cab Co.*, 332 U. S. 218, apart from other differences, conspiracy was charged to shut off a substantial share of the market permanently by means of vertical integration. *United States* v. *Pullman Co.*, 50 F. Supp. 123, in which many other factors were present and the share of the market considerable, was affirmed by an equally divided Court. 330 U. S. 806.

not irrelevant in a market analysis, see *Standard Oil Co.* v. *United States,* 337 U. S. 293, 309, this Court has never decided that they may, in the absence of conspiracy, be aggregated to support a charge of Sherman Law violation. Cf. *id.,* at 314. If other factors pertinent to a Sherman Law violation were present here, the Commission could not leave such factors unmentioned and simply ask us to review a broad unexplained finding that there is such a violation.[2] In any event, the Commission has not found any Sherman Law violation.

But we are told, as is of course true, that § 5 of the Federal Trade Commission Act comprehends more than violations of the Sherman Law. The Federal Trade Commission Act was designed, doubtless, to enable the

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[2] The strongest finding of the Commission, par. 11, Findings as to the Facts, 47 F. T. C., at 387, states that these contracts have been "of material assistance in permitting the respondent to hold for its own use the screens of the theaters with which such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theaters thereby limiting the outlets for their films in a more or less limited field and in some instances resulted in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising." Most contracts have the practical effect of excluding those who are not parties, and failure to obtain business is of course a cause of business failure. If all contracts are not to be bad on such reasoning, it seems there must be more, particularly in view of indications here not adverted to by the Commission in its formal findings that what little business failure there has been among competitors may to some extent have resulted from the inferior quality of those competitors' films. See Trial Examiner's Report Upon the Evidence, R. 44. In any event, such a finding does not establish a Sherman Law violation. In Sherman Law proceedings, we would have issues sharply defined in Sherman Law terms and findings from relevant evidence specifically directed to those terms made by the District Judge. Findings adverse to a claim of violation of the Sherman Law would have the weight given by Rule 52 (a) of the Federal Rules of Civil Procedure. Cf. *United States* v. *Oregon Med. Soc.,* 343 U. S. 326, 332.

Commission to nip in the bud practices which, when full blown, would violate the Sherman or Clayton Act. But this record does not explain to us how these practices, if full blown, would violate one of those Acts. The Commission has been content to rest on its conclusion that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly. If judicial review is to have a basis for functioning, the Commission must do more than pronounce a conclusion by way of fiat and without explication. This is not a tribunal for investigating an industry. Analysis of practices in the light of definable standards of illegality is for the Commission. It is for us to determine whether the Commission has correctly applied the proper standards and thus exhibited that familiarity with competitive problems which the Congress anticipated the Commission would achieve from its experience. Cf. *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 727.

No case is called to our attention which, because of factual similarity, would serve as a shorthand elucidation of the Commission's conclusion. The *Standard Oil* case, *supra,* relied on in the Commission's brief, does not serve this purpose. Although the *Standard Oil* case was brought under § 3 of the Clayton Act, I shall assume that it could have been brought under § 5 of the Federal Trade Commission Act, so that respondent cannot argue the inapplicability of the decision merely because the language of § 3 may be inapplicable. But taking that case simply as an expression of "policy" underlying § 5, it is not sufficient to support the holding in this case. In the *Standard Oil* case, we dealt with the largest seller of gasoline in its market; Standard had entered into exclusive supply contracts with 16% of the retail outlets in the area purchasing over $57,000,000 worth of gasoline. It may be that considerations undisclosed could be advanced to indicate that the percentage of the market

shut off here, calculated by a juggling of imponderables that we certainly would not confidently weigh without expert guidance, ought not to be considered significantly different from that in the *Standard Oil* case, or perhaps more important in the light of that decision, see 337 U. S., at 314, that the aggregate volume of business is of as great significance to the public as it was there. Even so, there are apparent differences whose effects we would need to have explained.

The obvious bargaining power of the seller *vis-à-vis* the retailer does not, so far as we are advised, have a parallel here. Nor are we apprised by proof or analysis to disregard the fact that here the advertising, unlike sales of gasoline by the retailer in the *Standard Oil* case, is not the central business of the theaters and apparently accounts for only a small part of the theaters' revenues.[3] In any event, in the *Standard Oil* case we recognized the discrepancy in bargaining power and pointed out that the retailers might still insist on exclusive contracts if they wanted. See 337 U. S., at 314. And although we are not told in this case whether the pressure for exclusive contracts comes mainly from the distributor or the theater, there are indications that theaters often insist on exclusive provisions. See Findings as to the Facts No. 12, *In re Motion Picture Advertising Service Co., supra,* at 388.

Further, the findings of the Commission indicate that there are some factual differences in the "exclusive" pro-

[3] It may well be that this factor will turn out to be of little significance. In an entirely different context, we recognized that such a factor need not be decisive in an attempt to assess the competitive effects, as among purchasers, of discriminatory pricing. See *Federal Trade Commission* v. *Morton Salt Co.,* 334 U. S. 37, 49–50. Since here, however, the factor probably bears more on the relative bargaining power of theaters and distributors than on competitive effects among the theaters, different considerations may operate.

visions here, for in this industry, as may not have been feasible in gasoline retailing, distributors of films often do have access to the theaters having nominally exclusive contracts with competing distributors. At times the exclusive provision may do little more than give the distributor a priority over other distributors in the use of screen space. Indeed, the degree of exclusion of competitors in some instances is represented simply by the inadequacy of a 15% commission paid the "excluded" competitor when he is permitted to show his films in theaters nominally exclusive. The Commission found the 15% unprofitable in local advertising, but it did not find how much of the affected competitors' total business, which may also have included manufacturer-dealer or cooperative advertising and national advertising, was in effect excluded because of the unprofitability of the commission in local advertising. In short, we are not told that the exclusive feature here should be considered the economic equivalent of that in the *Standard Oil* case.

Although the facts of this case do not meet the *Standard Oil* decision, even if that case is taken merely as an expression of antitrust policy engrafted on § 5, it is urged that the Commission should be allowed ample discretion in developing the law of unfair methods of competition to meet the exigencies of a particular situation without undue hampering by the Court. But if judicial review is to have any meaning, extension of principle to meet new situations must be based on some minimum demonstration to the courts that the Commission has relied on relevant criteria to conclude that the new application is in the public interest. In this case, apart from equivocal statements in the Trial Examiner's report on the evidence as to the interests affected by exclusion from this market, we have no specific indication of the need for enforcement in this area, cf. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 314, even if the Com-

mission had afforded reasons why the law of unfair methods of competition should strike down exclusive contracts such as those here involved. At the least, we should remand this case to the Commission for adequate explanation of the reasons why the public interest requires its intervention and this order.[4] Cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19.

It is of great importance to bear in mind that the determination of the scope of the prohibition of "unfair methods of competition" has not been left to the administrative agency as part of its fact-finding authority but is a matter of law to be defined by the courts. See *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427. The significance of such judicial review may be indicated by the dissimilar treatment of comparable standards entrusted to the enforcement of the Interstate Commerce Commission. In dealing with the provisions of the Interstate Commerce Act requiring reasonableness in rates and practices from carriers subject to the control of the Commerce Commission, we read the Act as making the application of standards of reasonableness a determination of fact by that Commission and not an issue of law for the courts. Unlike the Federal Trade Commission Act, the Interstate Commerce Act dealt with governmental regulation not only of a limited sector of the economy but of economic enterprises that had long been singled out for public control. The range within which the broadly stated concepts of reasonable-

[4] Since I take this view of the case, I need not attempt to determine whether the issues in this case have already been adjudicated in favor of the respondent. Without consideration of the record in the former proceedings, I cannot say whether the issues, raised as they apparently were in the pleadings before the Commission, were decided so as to preclude a second trial of those issues. Circumstances now undisclosed may justify the Commission's exercise of its flexible powers.

ness moved was confined as well as defined by experience, and application of the concepts was necessarily limited to easily comparable economic activity. On the other hand, the Federal Trade Commission Act gave an administrative agency authority over economic controls of a different sort that began with the Sherman Law—restrictions upon the whole domain of economic enterprise engaged in interstate commerce. The content of the prohibition of "unfair methods of competition," to be applied to widely diverse business practices, was not entrusted to the Commission for *ad hoc* determination within the interstices of individualized records but was left for ascertainment by this Court.

The vagueness of the Sherman Law was saved by imparting to it the gloss of history. See *Nash* v. *United States,* 229 U. S. 373. Difficulties with this inherent uncertainty in the Sherman Law led to the particularizations expressed in the Clayton Act. 38 Stat. 730. The creation of the Federal Trade Commission, 38 Stat. 717, made available a continuous administrative process by which fruition of Sherman Law violations could be aborted. But it is another thing to suggest that anything in business activity that may, if unchecked, offend the particularizations of the Clayton Act may now be reached by the Federal Trade Commission Act. The curb on the Commission's power, as expressed by the series of cases beginning with the *Gratz* case, *supra,* so as to leave to the courts rather than the Commission the final authority in determining what is an unfair method of competition, would be relaxed, and unbridled intervention into business practices encouraged.

I am not unaware that the policies directed at maintaining effective competition, as expressed in the Sherman Law, the Clayton Act, as amended by the Robinson-Patman Act, and the Federal Trade Commission Act, are difficult to formulate and not altogether harmonious.

Therefore, the interpretation of the Acts by the agency which is constantly engaged in construing them should carry considerable weight with courts even in the solution of the legal puzzles these statutes raise. But he is no friend of administrative law who thinks that the Commission should be left at large. In any event, whatever problems would be raised by withholding judicial review from determinations of the Commission are for Congress to face, at least in the first instance. (See my views expressed in *Stark* v. *Wickard,* 321 U. S. 288, 311.) Until Congress chooses to do so, we cannot shirk our duty by leaving determinations of law to the discretion of the Federal Trade Commission. Not only must we abstain from approving a mere say-so of the Commission and thus fail to discharge the task implied by judicial review. It is also incumbent upon us to seek to rationalize the four statutes directed toward a common end and make of them, to the extent that what Congress has written permits, a harmonious body of law. This opinion is an attempt, at least by way of adumbration, to carry out this aim.

I would have the Court of Appeals remand this case to the Commission.

STONE v. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 320. Argued January 14, 1953.—Decided February 2, 1953.

In this action brought in a state court under the Federal Employers' Liability Act, to recover damages for an injury suffered by petitioner while working as a member of a section crew removing old or worn crossties on respondent's railroad line, the issues of negligence and causation were peculiarly for the jury; and the reversal of a verdict for petitioner on the ground that a submissible case had not been made out was erroneous. Pp. 407–410.
249 S. W. 2d 442, reversed.

In an action in a state court under the Federal Employers' Liability Act, the verdict was for the plaintiff. The State Supreme Court reversed. 249 S. W. 2d 442. This Court granted certiorari. 344 U. S. 863. *Reversed,* p. 410.

Tyree C. Derrick argued the cause for petitioner. With him on the brief was *Karl E. Holderle, Jr.*

Lon Hocker argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was a member of one of respondent's section crews and while in the course of his employment severely injured his back. He brought this action for damages in the Missouri courts under the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.* There was a jury trial and a verdict for petitioner. The Missouri Supreme Court reversed, holding that plaintiff had not made out a sub-

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missible case either as to negligence or as to causation. 249 S. W. 2d 442. The case is here on certiorari. 344 U. S. 863.

At the time of the injury petitioner was removing old or worn track ties. The rails would be jacked up, the spikes that held the rails pulled, the plates removed, and the tie pulled. The ties were usually pulled with tongs by two men. If there were any old spikes protruding downward from the tie into the ground, three or four men would usually be required to pull the tie.

There were three *other* ways to remove a stubborn tie. One was to dig a trench beside the tie and then roll the tie into the trench. Another method was to jack the rail up high enough so the tie would come free. The objection to that method was that the ballast would run under the other ties and produce a hump in the track. Another way was to free the rail from the ties a half-rail length on each side of the tie to be removed and then to jack the rail up, freeing the tie sufficiently so that it could easily be moved. This method had disadvantages on a track as active as this one in that it meant putting up a flag and stopping trains.

This day Stoughton, the straw boss, used only the first method. Petitioner and one Fish together were unable to remove a tie because, as it turned out, a spike was driven through it into the ground. Stoughton told petitioner he was not pulling hard enough. Stoughton put a bar under the far end of the tie while petitioner and Fish pulled again. Still the tie would not come. Stoughton told petitioner to pull harder. Petitioner said he was pulling as hard as he could. Stoughton then said, "If you can't pull any harder I will get somebody that will." So petitioner, with Fish, gave a hard pull and hurt his back. The tie was finally pulled by four men—two pulling, one prying with a crowbar, one hammering

with a maul; and it turned out that the tie had a spike driven through it and extending into the ground.

We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. *Wilkerson* v. *McCarthy,* 336 U. S. 53, 61. The straw boss had additional men to put on the tongs. He also had three alternative methods for removing stubborn ties. This was not the first difficult tie encountered by the section crew in this stretch of track. The likelihood of injury to men pulling or lifting beyond their capacity is obvious. Whether the straw boss in light of the risks should have used another or different method to remove the tie or failing to do so was culpable is the issue. To us it appears to be a debatable issue on which fair-minded men would differ. Cf. *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353; *Urie* v. *Thompson,* 337 U. S. 163, 178. The experience with stubborn ties, the alternative ways of removing them, the warning by petitioner that he had been pulling as hard as he could, the command of his superior to pull harder, the fact that more than two men were usually used in these circumstances—all these facts comprise the situation to be appraised in determining whether respondent was negligent. Those circumstances were for the trier of facts to appraise. Cf. *Blair* v. *B. & O. R. Co.,* 323 U. S. 600, 604. The fact that the employee, commanded to do the act that caused the injury, first protested does not place the risk of injury on him. *Id.,* p. 605. We think there was evidence of a causal connection between the order of Stoughton to pull harder and petitioner's back injury. The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury. *Ellis* v. *Union Pacific R. Co.,* 329

U. S. 649, 653; *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 523; *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 433.

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED and MR. JUSTICE JACKSON join, dissenting.

The Federal Employers' Liability Act embodies the common law conception of negligence, subject to certain qualifications. Thereby it has established national standards as the basis of liability by carriers for injuries or death to railroad employees in the course of their occupation. It authorized this liability to be enforced in the courts of the several States as well as in the Federal District Courts. Since this is a federal statute, the State courts must conform to these national standards. Thus, the substantive limitations upon common law negligence actions, as for instance those pertaining to assumption of risk and waivers, must be heeded by the State courts no matter what the local law of negligence may be.

However, the central components of liability for negligence—that it rests upon fault and that appropriate causality must be established between the negligent circumstances and the complained-of injury—are the same for actions under the Federal Employers' Act as for any other negligence actions. For reasons that I for one have long deplored, Congress has seen fit to make such a concept of negligence the basis of compensation for inevitably untoward incidents.

I deplore this basis of liability because of the injustices and crudities inherent in applying the common law concepts of negligence to railroading. To fit the hazards of railroad employment into the requirements of a negligence action is to employ a wholly inappropriate procedure—a procedure adequate to the simple situations for which it

was adapted but brutally unfit for the situations to which the Federal Employers' Liability Act requires that it be put. The result is a matter of common knowledge. Under the guise of suits for negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation.

The central difficulty in utilizing the concept of negligence for these railroad injuries is the vast range of discretion that issues of fault and of causality inevitably leave to judges in determining what conscientious judges must decide, namely, whether the facts warrant a finding of fault and causality; in other words, first, the trial judge's ruling whether there was enough to go to the jury, and, secondly, the duty of appellate judges in deciding whether the trial court could have found that there was enough evidence on those two basic issues to have the case go to the jury and enough, therefore, to sustain a verdict for the plaintiff. That equally honest and equally experienced judges, equally compassionate toward the injured employee or his bereaved family, may disagree on these questions, no fair-minded judge, it would seem, can deny. These questions of assessing facts are of a very different order of issues for courts from rulings regarding the applicable standards for a jury's guidance.

Uniformity of direction in fitting the myriad diversity of circumstances to the applicable standards is essential. It is a duty which ultimately belongs to this Court and one which it is fitted to discharge. To assess the unique circumstances of a case is quite a different matter. And for the decisive reason that right and wrong are not objectively ascertainable, that in fact there is no right and wrong when two equally competent and equally inde-

pendent judges, equally devoid of any bias or possessed of the same bias, could by the same reasoning process reach opposite conclusions on the facts.

This is such a case. For the issue is not whether I think that the trial court was right in allowing this case to go to the jury. Congress has seen fit to allow this action to be brought in the State courts and to forbid removal of a case to the federal court even when diversity of citizenship exists. (These cases in the State courts run into the thousands.) In thus entrusting the enforcement of the Federal Employers' Liability Act to the State courts it presupposed, as a generality, the competence of the judiciaries of the States, their professional capacity to enforce the Act and their self-critical fairness toward its purposes. When it thus put the enforcement of the law in the keeping of State courts, the Congress knew that the determination of whether there is adequate evidence to sustain a claim of negligence is one of the most elusive determinations that judges are called upon to make. To suggest that the Congress knew this, and has known it right along, is not to indulge in a fiction. Congress is composed predominantly of lawyers and this aspect of the law of negligence is known by the merest tyro. Congress could hardly have assumed when the Federal Employers' Liability Act of 1908 was enacted that this Court must reverse the State judges merely because we and they differed, where difference was more than permissible, was inevitable, concerning whether or not a particular unique set of facts made out a case of negligence.

Congress very early gave emphatic proof that this was not the Court to sit in judgment upon the State courts every time a majority of this Court might view the evidence differently than the State court. In 1916 the Congress explicitly withdrew Federal Employers' Liability cases from the Court's mandatory jurisdiction

and left them to be reviewed only when a determination by a State court involved a federal question of substance. 39 Stat. 726, 727.

And so I dissent here because, while I am clear that equally understanding and fair-minded judges could have held that the facts of this case were for the jury, I am no less clear that I cannot say that the Missouri Supreme Court could not, as it did, hold that the plaintiff "did not make a submissible case under the Act either as to negligence or as to causation." 249 S. W. 2d 442, 449. The question before us is whether the judgment of the Missouri Supreme Court should be reversed. I cannot say it should be once I conclude that the Missouri court was entitled to the view it took and that I am not to substitute myself for that court in viewing the facts, although had I the independent primary responsibility of judgment I would take the other view.

GORDON ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 182. Argued December 17–18, 1952.—Decided Feb. 2, 1953.

Petitioners were convicted in a Federal District Court of unlawfully possessing and transporting goods stolen while in interstate commerce. On cross-examination, a key government witness admitted that (1) prior to the trial, he had given to government agents written statements which conflicted with his testimony incriminating petitioners at the trial, and (2) he had pleaded guilty in another federal court to unlawful possession of the same stolen goods and had not yet been sentenced. *Held:*

1. In the circumstances of this case, the trial court erred in denying petitioners' motion for the production and inspection of such conflicting written statements in the possession of the Government. Pp. 417–421.

2. The trial court erred in excluding from evidence a transcript of the proceedings in the other court showing that, in accepting the guilty plea and deferring sentence of this witness, the judge had advised him "to tell the probation authorities the whole story even though it might involve others." Pp. 421–422.

3. The combination of these two errors was sufficiently prejudicial to require reversal of petitioners' conviction. Pp. 422–423.

196 F. 2d 886, reversed.

Petitioners were convicted in a Federal District Court of unlawful possession and transportation of goods stolen while in interstate commerce. The Court of Appeals affirmed. 196 F. 2d 886. This Court granted certiorari. 344 U. S. 813. *Reversed,* p. 423.

George F. Callaghan and *Maurice J. Walsh* argued the cause and filed a brief for petitioners.

John R. Wilkins argued the cause for the United States. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Murray* and *Beatrice Rosenberg.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioners Gordon and MacLeod were convicted on an indictment of four counts, two charging unlawful possession of goods stolen while in interstate commerce [1] and two that defendants caused this property to be further transported in interstate commerce.[2] The Court of Appeals affirmed,[3] and we granted certiorari limited to questions concerning production and admission of documentary evidence tending to impeach the testimony of a prosecution witness.[4]

The Government proved that film being shipped from Rochester, New York, to Chicago, Illinois, was stolen from a truck in Chicago and that part of it later had been recovered in Detroit. To implicate the two petitioners, it relied principally on one Marshall, who, in Detroit, had pleaded guilty to unlawful possession of the film. Marshall testified that he and a codefendant, Swartz, who died before trial, on several occasions had driven from Detroit to Chicago and back. On each visit they had stopped at petitioner Gordon's Chicago jewelry store. On one trip, according to Marshall, Gordon accompanied them to a garage in that city and there Gordon and a man resembling MacLeod helped to load into Marshall's car film that was stacked in the garage. A week later, Marshall said, he and Swartz again called on Gordon, when the latter sent them to see "Ken" at an address which he wrote on a piece of paper. At this address, MacLeod identified himself as "Ken," and again the three men loaded film from the garage into Marshall's car.

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[1] 18 U. S. C. (Supp. V) § 659.

[2] 18 U. S. C. (Supp. V) § 2314.

[3] 196 F. 2d 886.

[4] 344 U. S. 813.

Partial corroboration of Marshall was supplied by a Federal Bureau of Investigation agent, who had been watching the garage. He testified that on the latter occasion he saw Marshall and Swartz drive up to MacLeod's address, whereupon MacLeod removed an old truck from the garage. Later, Swartz and Marshall drove away with film cartons stacked on the back seat of Marshall's car.

Both petitioners took the stand and denied complicity in the theft and knowledge that the film was stolen. While their physical movements as recited by them were not materially different from those related by government witnesses, petitioners gave a different and innocent version of the relationship of their acts to the criminal transactions. Gordon testified that the deceased Swartz was a business acquaintance who asked on the first visit if Gordon knew of a garage where a truck could be temporarily stored. Gordon called MacLeod, who was his partner in a rooming-house venture, and told him that he would send two men over who wished to use a garage back of the rooming house. MacLeod testified that he had not known either of the men before they placed a truck in the garage and that, at their request, he had helped load film from the truck into Marshall's car merely as a favor.

On cross-examination, Marshall admitted that between his apprehension and his final statement to the Government, which implicated petitioners, he had made three or four statements which did not. Petitioners requested the trial judge to order the Government to produce these earlier statements. The request was denied. Marshall also admitted that, one week before he made any statement incriminating petitioners, he had pleaded guilty to unlawful possession of the film in a federal court in Detroit. He was still unsentenced and no date for sentencing had been set, although nine months had elapsed since this plea was received. He denied that he had received

any promise of immunity or threats which would influence him to testify as he did. Petitioners then sought to introduce from the transcript of the Detroit proceeding this statement made to Marshall by the federal district judge: "Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding. . . . I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others." This was excluded on the objection that it was immaterial.

The trial judge in his charge and the Court of Appeals in its opinion [5] recognized that, where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. But the question for this Court is whether rejection of petitioners' two efforts to impeach the credibility of Marshall did not withhold from the jury information necessary to a discriminating appraisal of his trustworthiness to the prejudice of petitioners' substantial rights. The two issues stand on somewhat different grounds.

The request by the accused to order production of Marshall's earlier statements was cast in terms of obtaining access to documentary evidence rather than an offer

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[5] 196 F. 2d 886, 888.

that would require a ruling on its admissibility. But the Government apparently concedes, as we think it must, that if it would have been prejudicial error for the trial judge to exclude these statements, had the defense been able to offer them, it was error not to order their production. The relation of admissibility to production for inspection is by no means settled in the various jurisdictions, but we conclude that the Government does not concede enough. Demands for production and offers in evidence raise related issues but independent ones, and production may sometimes be required though inspection may show that the document could properly be excluded.

In the absence of specific legislation, questions of this nature are governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [6] Apparently, earlier common law did not permit the accused to require production of such documents.[7] Some state jurisdictions still recognize no comprehensive right to see documents in the hands of the prosecution merely because they might aid in the preparation or presentation of the defense.[8] We need not consider such broad doctrines in order to resolve this case, which deals with a limited and definite category of documents to which the holdings of this opinion are likewise confined.

By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main

[6] *Funk* v. *United States,* 290 U. S. 371; Fed. Rules Crim. Proc., 26.

[7] 6 Wigmore on Evidence, § 1859g.

[8] 2 Wharton's Criminal Evidence (11th ed.) § 785.

issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up.[9] Nor was this a demand for statements taken from persons or informants not offered as witnesses.[10] The Government did not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise.

Despite some contrary holdings on which the courts below may have relied, we think their reasoning is outweighed by that of highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to the production of such documents.[11] Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that "The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons." [12] In the light of our reason and experience, the better rule is that upon the foundation that was laid the court should have overruled the objections which the Government advanced and ordered production of the documents.

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[9] As to the pretrial discovery stage, compare Fed. Rules Civ. Proc., 34, with the narrower provisions of Fed. Rules Crim. Proc., 16.

[10] In *Goldman* v. *United States*, 316 U. S. 129, the notes sought to be inspected had neither been used in court, nor was there any proof that they would show prior inconsistent statements.

[11] *Asgill* v. *United States*, 60 F. 2d 776; *United States* v. *Krulewitch*, 145 F. 2d 76, 79; *People* v. *Davis*, 52 Mich. 569, 18 N. W. 362; *State* v. *Bachman*, 41 Nev. 197, 168 P. 733; *People* v. *Schainuck*, 286 N. Y. 161, 164, 36 N. E. 2d 94, 95–96; *People* v. *Walsh*, 262 N. Y. 140, 186 N. E. 422.

[12] *People* v. *Davis*, 52 Mich. 569, 573, 18 N. W. 362, 363.

The trial court, of course, had no occasion to rule as to their admissibility, and we find it appropriate to consider that question only because the Government argues that the trial judge, in the exercise of his discretion, might have excluded these prior contradictory statements and, since that would not have amounted to reversible error, it was not such to decline their production. We think this misconceives the issue. It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected.[13] For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error.

The Court of Appeals affirmed on the ground that Marshall's admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing

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[13] We note in passing that the rules relating to impeachment by prior self-contradiction, which provide that such contradiction may be shown only on a matter material to the substantive issues of the trial, contain within themselves a guarantee against multiplication and confusion of issues. Therefore the discretion of the trial judge in excluding otherwise admissible evidence of this type is not as wide as it is in the vague and amorphous area of cross-examination of character witnesses. See *Michelson* v. *United States,* 335 U. S. 469.

it meets all other requirements of admissibility and no valid claim of privilege is raised against it.[14] The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance.[15] Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. Except the testimony of this witness be believed, this conviction probably could not have been had. Yet, his first statement was that he got the film from Swartz; his first four statements did not implicate these petitioners and his fifth did so only after the judicial admonition we will later consider. The weight to be given Marshall's implication of the petitioners was decisive. Since, so far as we are now informed by the record, we think the statements should have been admitted, we cannot accept the Government's contention based on a premise that the court was free to exclude them. It was error to deny the application for their production.

The second effort to impeach Marshall was to offer parts already quoted from the transcript of proceedings

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[14] 3 Wigmore on Evidence, § 1037; 3 Wharton's Criminal Evidence (11th ed.) § 1309.

[15] The best evidence rule is usually relied upon by one opposing admission, on the ground that the evidence offered by the proponent does not meet its standards. Its merit as an assurance of the most accurate record possible commends its extension to this unique situation where it is the proponent who seeks to rely on it.

in Detroit. Although Marshall admitted pleading guilty to the offense and that nine months later he was still unsentenced, he denied that he had received either promises or threats. The transcript would have shown the jury that a federal judge, who still retained power to fix his sentence, in discussing Marshall's expectation of a "recommendation for a lenient sentence or for probation" had urged him to tell all he knew, "even though it might involve others." Involvement of others, whom Marshall had not theretofore mentioned, soon followed. We think the jury should have heard this warning of the judge, which was an addition to the matter brought out on cross-examination. The question for them is not what the judge intended by the admonition, nor how we, or even they, construe its meaning. We imply no criticism of it, and he expressly stated that he was holding out no promise. But the question for the jury is what effect they think these words had on the mind and conduct of a prisoner whose plea of guilty put him in large measure in the hands of the speaker. They might have regarded it as an incentive to involve others, and to supply a motive for Marshall's testimony other than a duty to recount the facts as best he could remember them. Reluctant as we are to differ with an experienced trial judge on the scope of cross-examination, the importance of this witness constrains us to hold that the transcript was erroneously excluded.

We believe, moreover, that the combination of these two errors was sufficiently prejudicial to require reversal. The Government, in its brief, argues strongly for the widest sort of discretion in the trial judge in these matters and urges that even if we find error or irregularity we disregard it as harmless [16] and affirm the conviction. We

[16] Fed. Rules Crim. Proc., 52 admonishes us that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

are well aware of the necessity that appellate courts give the trial judge wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character. *Michelson* v. *United States,* 335 U. S. 469. But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights and the judgment must be

Reversed.

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BROCK *v.* NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 34. Argued October 23, 1952.—Decided February 2, 1953.

At a criminal prosecution of petitioner in a North Carolina state court, the judge declared a mistrial on the motion of the prosecution after two of the State's witnesses refused to give any testimony before the jury. Petitioner was later convicted of the same offense in another trial and his plea of double jeopardy overruled. *Held:* To try petitioner a second time for the same offense after a first trial had been interrupted in the interests of justice did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 424–428.

234 N. C. 390, 67 S. E. 2d 282, affirmed.

Petitioner was convicted in a criminal prosecution in a North Carolina state court. The State Supreme Court affirmed. 234 N. C. 390, 67 S. E. 2d 282. This Court granted certiorari. 343 U. S. 914. *Affirmed,* p. 428.

Robert S. Cahoon argued the cause and filed a brief for petitioner.

Ralph Moody, Assistant Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *Harry McMullan,* Attorney General.

Mr. Justice Minton delivered the opinion of the Court.

The petitioner and two others, Jim Cook and Elmer Matthews, employees on strike from a mill at Tarboro, North Carolina, were arrested for firing five shots from a passing auto into the house of a watchman at the mill, J. D. Wyatt. Wyatt's house was occupied at the time of the shooting by himself, his wife, his daughter and

son-in-law, and the latter couple's baby. After the shooting, the petitioner and Cook and Matthews were taken to the jail. In the presence of the sheriff, a police officer, and the petitioner, Cook stated that the petitioner had helped plan the assault and had fired the shots.

Cook and Matthews were tried first and were found guilty of assault with a deadly weapon. Before judgments were entered on their convictions, the petitioner was placed on trial. The State put three witnesses on the stand—the sheriff, the police officer, and Wyatt's son-in-law. The State then put Cook and Matthews on the stand, intending to use their testimony to corroborate that of the other three witnesses. Cook and Matthews refused to answer the questions of the State on the ground that such answers might tend to incriminate them, and their counsel informed the court that in the event of an adverse judgment on their convictions, they would appeal therefrom to the Supreme Court of North Carolina. The trial court upheld their refusal to answer. The State represented to the court that the testimony of Cook and Matthews was necessary for the State to present its case fully before the jury, and moved that the court withdraw a juror from the sworn panel and declare a mistrial. The court did so, stating: "being of the opinion that the ends of justice require that the State have available for its [*sic*] testimony of the witnesses Jim Cook and Elmer Matthews when the case is tried and that the State is entitled to have those witnesses to testify after their cases have been disposed of in the Supreme Court, in its discretion withdraws a juror . . . and orders a mistrial of this case and that the same be continued." The petitioner objected.

The Supreme Court of North Carolina affirmed the convictions of Cook and Matthews. 231 N. C. 617, 58 S. E. 2d 625. The State then proceeded to impanel a

jury for the second time, and this time it tried the petitioner to conclusion before this panel. He objected that to do so would place him in jeopardy a second time and thus deny him due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. His objection was overruled, and he was placed on trial. Cook testified as a witness for the State. The petitioner was found guilty and sentenced to two years' imprisonment. From this judgment, he appealed to the Supreme Court of North Carolina, which affirmed his conviction. *State* v. *Brock,* 234 N. C. 390, 67 S. E. 2d 282. He then sought certiorari here, which we granted. 343 U. S. 914.

North Carolina has said there is no double jeopardy because the trial court has the discretion to declare a mistrial and require the defendant to be presented before another jury if it be in the interest of justice to do so. This has long been the common-law rule in North Carolina. *State* v. *Brock, supra; State* v. *Dove,* 222 N. C. 162, 22 S. E. 2d 231; *State* v. *Guice,* 201 N. C. 761, 161 S. E. 533; *State* v. *Weaver,* 13 Ired. L. (35 N. C.) 203.

The question whether such a procedure would be double jeopardy under the Fifth Amendment to the Constitution of the United States is not raised in this case, as the Fifth Amendment applies only to federal jurisdictions. *Palko* v. *Connecticut,* 302 U. S. 319; *Twining* v. *New Jersey,* 211 U. S. 78.

The question before us is whether the requirement that the defendant shall be presented for trial before a second jury for the same offense violates due process of law as required of the State under the Fourteenth Amendment. The question has been here before under different circumstances. In *Palko* v. *Connecticut, supra,* the defendant was first tried for murder in the first degree and was found

guilty of murder in the second degree. Pursuant to a statute of Connecticut, the State appealed and obtained a reversal for errors of law at the trial. The defendant was retried, convicted of murder in the first degree, and sentenced to death. An appeal to this Court raised the question whether or not the requirement that he stand trial a second time for the same offense placed him twice in jeopardy, in violation of due process.

This Court held that the State had not denied the defendant due process of law. In order to indicate the nature of due process, this Court asked two questions:

> "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? . . . The answer surely must be 'no.' " 302 U. S. 319, 328.

Here the answer must be the same.

This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. *Wade* v. *Hunter,* 336 U. S. 684; *Thompson* v. *United States,* 155 U. S. 271, 273–274. As was said in *Wade* v. *Hunter, supra,* p. 690, "a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." Justice to either or both parties may indicate to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury. As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of

each case. The pattern here, long in use in North Carolina, does not deny the fundamental essentials of a trial, "the very essence of a scheme of ordered justice," which is due process.

The judgment is

Affirmed.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

Once it is agreed that the claim here made—freedom from being tried a second time on a criminal charge—must be tested by the independent scope of the Due Process Clause of the Fourteenth Amendment and not on the basis of the incorporation of the Fifth Amendment into the Fourteenth, the application of the guarantee of due process to a specific situation makes relevant the specific phrasing of a common result. I, therefore, deem it appropriate to add a word to the Court's opinion, in which I join.

The judicial history of the Fifth Amendment in prohibiting any person from being "subject for the same offence to be twice put in jeopardy of life or limb" serves as a good pragmatic confirmation of the compelling reasons why the original Bill of Rights was found to limit the actions of the Federal Government and not those of the States. The conflicting views expressed in *Ex parte Lange,* 18 Wall. 163; *Kepner* v. *United States,* 195 U. S. 100; *Trono* v. *United States,* 199 U. S. 521; *In re Bradley,* 318 U. S. 50; and *Wade* v. *Hunter,* 336 U. S. 684, indicate the subtle technical controversies to which the provision of the Fifth Amendment against double jeopardy has given rise. Implications have been found in that provision very different from the mood of fair dealing and

justice which the Fourteenth Amendment exacts from a State in the prosecution of offenders. A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time.

Unless we can say that the trial judge was not justified in the circumstances of this case in concluding that the ground for requesting a mistrial was fair and not oppressive to the accused, we would not be warranted in finding that the State of North Carolina, through its Supreme Court, denied the petitioner due process of law. The record does not seem to me to justify such a finding.

MR. CHIEF JUSTICE VINSON, dissenting.

The petitioner and two others, Cook and Matthews, were indicted for shooting into the home of J. D. Wyatt when Wyatt and four other persons were present therein. After arrest, Cook and Matthews confessed, charging Brock with firing the shots. Brock made no confession.

Cook and Matthews were tried together. Wyatt, Hathaway and Bardin, the sheriff of the county, were the witnesses presented by the State. Bardin, the sheriff, testified as to the confessions of Cook and Matthews. Cook and Matthews did not testify in their own behalf. There was a verdict of guilty of assault with a deadly weapon.

Judgment had not been entered on the verdict when Brock was placed on trial.

The same witnesses used in the foregoing trial, Wyatt, Hathaway and Bardin, testified for the State. The latter witness again testified that Cook and Matthews had

stated that Brock fired into the house. The prosecutor offered Cook and Matthews as witnesses. They declined to testify on the ground of self-incrimination, and the court sustained this claim of privilege.

At this point, the Solicitor moved to withdraw a juror and for a mistrial and the continuance of the case pending final judgment against Cook and Matthews. His motion was granted, and a mistrial and continuance of the case ordered.

Thereafter, a judgment of two years' imprisonment was entered on the verdict against Cook and Matthews. Their appeal to the Supreme Court of North Carolina was affirmed. 231 N. C. 617, 58 S. E. 2d 625 (1950).

Subsequently, Brock was brought to trial again. He interposed a plea of former jeopardy which the court denied. Proper exceptions were taken and the federal question herein presented and preserved. Then he pleaded not guilty to the indictment. The same three witnesses, Wyatt, Hathaway and Bardin, the sheriff, testified in Brock's second trial to facts substantially similar to their evidence in the first trial. The sheriff reiterated his testimony that Cook and Matthews had stated that Brock fired the rifle into the house. Thereupon, the Solicitor called Cook and Matthews to the stand, and this time they testified to the part that they took in the shooting and that Brock had fired into the Wyatt home. The jury convicted, and Brock was sentenced for a two-year imprisonment.

The Supreme Court of North Carolina affirmed the judgment, holding that Brock's plea of former jeopardy was properly denied. *State* v. *Brock,* 234 N. C. 390, 67 S. E. 2d 282 (1951).

The petitioner is here urging that he was placed in jeopardy a second time, and thereby was denied due process of law guaranteed to him by the Fourteenth Amend-

ment to the Constitution of the United States. We granted certiorari. 343 U. S. 914 (1952).

For the first time in the history of this Court, it is urged that a state could grant a mistrial in order that it might present a stronger case at some later trial and, in so doing, avoid a plea of former jeopardy in the second trial.

The Solicitor had convicted two defendants engaged in the same crime, by the testimony of Wyatt, Hathaway and Bardin, the sheriff. Cook and Matthews had refused to testify in their own behalf in that trial. Immediately the first Brock trial followed. The judgment of conviction against Cook and Matthews had not been entered. No motion for a continuance appears in the record. The State willingly entered upon the trial. It had all the witnesses and the evidence which had convicted Cook and Matthews of the same crime. It presented that evidence. Cook and Matthews refused to testify on the ground of self-incrimination, and the court sustained their position. Under the circumstances, the Solicitor either knew or should have known that Cook and Matthews would not testify. After all the State's evidence was in, and after Cook and Matthews refused to testify, the Solicitor moved for a mistrial. The basis for his motion was that the State would, at a later date, be able to present a stronger case against Brock since Cook and Matthews might, at a later date, testify differently or to additional facts than at the first trial. It must be remembered that they had not testified at any trial. The court sustained the motion that a juror be withdrawn and a mistrial ordered and the case continued pending the final judgment in the case against Matthews and Cook. The court stated it was of the opinion that "the ends of justice require that the State have available for its testimony of the witnesses Jim Cook and Elmer Matthews when the case is tried and that the State is entitled to

have those witnesses to testify after their cases have been disposed of in the Supreme Court." [1]

The sole question is whether the record in this case presents an offense to fundamental fairness and due process. Under the results reached by the Court, the state is free, if the prosecutor thinks a conviction probably cannot be won from the jury on the testimony at the trial, to stop the trial and insist that it be tried again on another day when it has stronger men on the field.

Orderly justice could not be secured if the rules allowed the defendant to ask for a mistrial at the conclusion of testimony just because the state had done well and the defense poorly. The same limitation applies to the prosecution if the scales of justice are to be kept in equal balance.[2] This Court recently has said that, in applying the concept of due process of law, judges are not at large to apply their own personal standards. *Rochin* v. *California,* 342 U. S. 165 (1952). Thus, the considered views of many other jurisdictions may be utilized in determining the basic requirements of orderly justice and hence due process. *Wolf* v. *Colorado,* 338 U. S. 25 (1949).

I grant that North Carolina contends that its present procedure does not violate fundamental fairness. It was not always so. In *State* v. *Garrigues,* 2 N. C. (1 Haywood, 2d ed.) 276, 278 (1795), the Supreme Court of North Carolina adopted the contrary rule in the following strong language:

> ". . . in the reigns of the latter sovereigns of the *Stuart* family, a different rule prevailed, that a jury in such case might be discharged for the purpose of having better evidence against him at a future day; and this power was exercised for the benefit of the

[1] R. 16.

[2] Cf. the classic expression of Mr. Justice Cardozo in the opinion of this Court in *Palko,* "The edifice of justice stands, its symmetry, to many, greater than before." 302 U. S. 319, 328 (1937).

> crown only: *but it is a doctrine so abhorrent to every principle of safety and security, that it ought not to receive the least countenance in the courts of this country.* In the time of *James* the second, and since the Revolution, this doctrine came under examination, and the rule as laid down by *L. Coke* was revived . . . . In the present case, the jury were suffered by the court's officer to separate without giving a verdict; as they could not agree to convict, it is strong evidence of the party's innocence; and perhaps he could not be tried again with the same advantage to himself as then. Perhaps his witnesses are dead, or gone away, or their attendance not to be procured, or some accident may prevent their attendance. We will not again put his life in jeopardy, more especially as it is very improbable we shall be able to possess him of the same advantages—So he was discharged." (Emphasis supplied.)

In the case of *In re Spier,* 12 N. C. 491, 493, 494, 498, 499, 502 (1828), the court pointed out—

> Hall, Judge.—"In this case, the guilt or innocence of the prisoner is as little the subject of enquiry, as the merits of any case can be, when it is brought before this Court on a collateral question of law. Although the prisoner, if unfortunately guilty, may escape punishment, in consequence of the decision this day made in his favor, yet it should be remembered, that the same decision may be a bulwark of safety to those, who, more innocent, may become the subjects of persecution, and whose conviction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not."
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> Taylor, Chief-Justice.—"In the remarkable case of the *Kenlocks,* reported by *Foster* . . . . A majority of the Judges . . . rejected with just animadversion

the authority of those cases, which had occured in that period of misrule and persecution, preceeding the revolution. In one of these, the Court discharged a Jury in a capital case, *after evidence given on the part of the Crown, merely for want of sufficient evidence to convict, and in order to bring the prisoner to a second trial, when the Crown should be better prepared!* . . .

"These stains upon the administration of justice show to what extremes, in a state of civil discord, the passions of men urge them to trample upon the most salutary principles of law; and in what degree Judges, holding their office at the will of the sovereign, were eager to pander to his appetite for blood and forfeitures.

. . . . . .

". . . As *the common law of every state already protects the accused against a second trial, not only in crimes of all descriptions,* but in questions of civil right, *it is to be inferred that the Constitutions meant much more, and that their design was to protect the accused against a trial, where the first Jury had been discharged without due cause.*" (Emphasis supplied.)

But, we are told that in a later day, the North Carolina court departed from its earlier rule. We are directed to *State* v. *Dove,* 222 N. C. 162, 22 S. E. 2d 231 (1942); *State* v. *Guice,* 201 N. C. 761, 161 S. E. 533 (1931); *State* v. *Bass,* 82 N. C. 570 (1880); *State* v. *Andrews,* 166 N. C. 349, 81 S. E. 416 (1914); and *State* v. *Ellis,* 200 N. C. 77, 156 S. E. 157 (1930).

In the *Guice* case, the State introduced its evidence and rested its case. Counsel for the defendant made a motion for judgment as of nonsuit. The court withdrew a juror and ordered a mistrial, and the authority of the court to take this course was the question presented on

appeal. The Supreme Court of North Carolina, in disposing of the matter, said:

> "In misdemeanors, and all cases of felonies not capital, the court below has the discretion to order a mistrial and discharge a jury before verdict in furtherance of justice and the court need not find facts constituting the necessity for such discharge, and ordinarily the action is not reviewable. In capital felonies the facts must be found and the necessity for such discharge is subject to review." [3]

In the *Bass* case, *supra,* the court held that the judge "had the discretion to dissolve the jury and hold the defendants for a new jury, and that the security for the proper exercise of his discretion rests not on the power of this court to review and reverse the judge, but on his responsibility under his oath of office." [4]

While the technical ramifications evolved in the many jurisdictions as part of the doctrine of double jeopardy do not fall within the scope of due process, the basic idea is part of our American concept of fundamental fairness. This is shown by the universality of the provision against double jeopardy. The Fifth Amendment to the Federal Constitution, inapplicable here, prohibits double jeopardy. The Constitutions of all but five states, Connecticut, Maryland, Massachusetts, North Carolina, and Vermont, contain clauses forbidding double jeopardy.[5] And each of those five states has the prohibition against double jeopardy as part of its common law.[6]

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[3] 201 N. C., at 763, 161 S. E., at 534 (1931).

[4] 82 N. C., at 575 (1880).

[5] *State* v. *Brunn,* 22 Wash. 2d 120, 154 P. 2d 826, 157 A. L. R. 1049 (1945).

[6] *State* v. *Benham,* 7 Conn. 414 (1829); *Gilpin* v. *State,* 142 Md. 464, 121 A. 354 (1923); *Commonwealth* v. *McCan,* 277 Mass. 199, 178 N. E. 633, 78 A. L. R. 1208 (1931); *State* v. *Clemmons,* 207 N. C. 276, 176 S. E. 760 (1934); and *State* v. *O'Brien,* 106 Vt. 97, 170 A. 98 (1934).

No case in any other jurisdiction to support North Carolina's action in this case has been pointed out to us, and my research fails to find a single prop supporting its position. On the other hand, eight states have had occasion to rule on whether there might be a second trial after the prosecutor at a previous trial was unable to present evidence. Six have taken a firm position against allowing a second trial.[7] A seventh, Iowa, is in accord with the above view,[8] for language to the contrary in two other Iowa cases is not in point since the mistrials in those two cases were upon the motion of the defendant.[9] In Alabama, the eighth State, two cases have permitted a second trial.[10] Both of those cases, however, involved facts of such extreme nature that it would have been

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[7] *Allen* v. *State*, 52 Fla. 1, 41 So. 593 (1906) (during first trial defendant secured continuance to secure absent witness, prosecutor then moved for and secured mistrial); *State ex rel. Meador* v. *Williams*, 117 Mo. App. 564, 92 S. W. 151 (1906) (prosecution witness did not respond to subpoena); *People* v. *Barrett*, 2 Caines (N. Y.) 304, 2 Am. Dec. 239 (1805) (State could not use secondary evidence as to document since defendant not given due notice to produce); *State* v. *Richardson*, 47 S. C. 166, 25 S. E. 220 (1896) (prosecutor by mistake told witness to go home); *Pizaño* v. *State*, 20 Tex. App. 139, 54 Am. Rep. 511 (1886) (prosecutor answered ready and started trial after being incorrectly informed by sheriff that all witnesses were present); *State* v. *Little*, 120 W. Va. 213, 197 S. E. 626 (1938) (at noon recess prosecutor told witnesses to be back at 1:30 p. m.; when they had not returned by 2 p. m. he secured mistrial). Only the leading case in each jurisdiction has been cited. There is a total of approximately fifteen more decisions in these jurisdictions in accord with the cited cases.

[8] *State* v. *Callendine*, 8 Iowa 288 (1859) (witness incompetent to testify because his name not indorsed on indictment, mistrial on motion of the court).

[9] *State* v. *Parker*, 66 Iowa 586, 24 N. W. 225 (1885), and *State* v. *Falconer*, 70 Iowa 416, 30 N. W. 655 (1886).

[10] *State* v. *Nelson*, 7 Ala. 610 (1845) (jury irregularly sworn too early and the proceedings then revealed further issues previous to the

shocking to the conscience not to permit a second trial. In one of the cases,[11] the Alabama Supreme Court even indicated the result probably would be different if the prosecutor merely had been unprepared at the first trial.

The rule to be gleaned from the cases is that a second trial will be allowed only for extreme circumstances, often contributed to by the defendant and beyond the control of the prosecutor, which prevented the testimony from being available at the first trial. Only North Carolina has clear precedent allowing a second trial when the prosecutor simply failed to have his evidence ready at the first trial.[12]

It may be considered that this being a noncapital felony that the considered action of the judiciary of a state should be followed when it is said it is in the furtherance of justice. It certainly is the easy way out, but in view of the fact that no other state in the Union has gone to this extreme of the North Carolina rule, I must ponder upon it and conclude that the hard-won victory achieved

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time the jury should have been impaneled and sworn); *Hughes* v. *State*, 35 Ala. 351 (1860) (before trial defendant agreed to a mistrial if a certain witness were too intoxicated to testify; defendant then objected to a mistrial when the agreed condition occurred).

[11] "If the question really was, that the jury had been discharged because the prosecuting officer was not prepared to proceed with the trial, we should entertain very serious doubts of the power of a Court to discharge a jury for that cause only; but it is a very different matter when, from the intervention of some irregularity in the proceedings, either a jury has been improperly impanneled, or an improper juror sworn." *State* v. *Nelson*, *supra*, at 614.

[12] *State* v. *Dove*, 222 N. C. 162, 22 S. E. 2d 231 (1942) (court ordered mistrial since evidence desired by State "was not presently available"); *State* v. *Guice*, 201 N. C. 761, 161 S. E. 533 (1931) (defendant moved for nonsuit after State had offered all its testimony; court instead of ruling on the motion for nonsuit declared a mistrial).

in the field of "double jeopardy" ought not be lost even in a small part by the affirmance of this case.

The Attorney General of North Carolina relies upon *Palko* v. *Connecticut,* 302 U. S. 319 (1937), in support of his position that the second trial of this defendant did not violate due process. In *Palko,* there was an appeal by the State, as allowed by statute. The Supreme Court of Connecticut found three errors prejudicial to the State committed by the trial court, and reversed the judgment and ordered a new trial.[13] The second trial then followed. In the case before the Court, no error of law tainted the first trial.

It is apparent that in the *Palko* case, the Legislature of Connecticut had provided for a review of the trial by appeal. We often have said that the considered action by a state legislature or the Congress of the United States places the issue of constitutionality in a different posture in respect of due process of law. We agree that *Palko* decided that this Court could consider a particular case of double jeopardy of a defendant as not being within the protective limits of due process of the Fourteenth Amendment to the Constitution.

Certainly, *Palko* did not decide the issue in this case. In that case, under a state statute, the State was asking for a second trial to obtain a trial free from error by the court prejudicial to the State. Here, the State asks for its second trial in order to suit the convenience of the Solicitor in an endeavor to strengthen the State's case, when the defendant had done nothing either to bring about trial errors or to inveigle or entrap the Solicitor to proceed to the first trial.

While this case is not controlled by *Palko,* I am comforted by language found in it which, in my view, envisions this case as one which might well be within the

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[13] *State* v. *Palko,* 121 Conn. 669, 186 A. 657 (1936).

protective embrace of the Due Process Clause of the Fourteenth Amendment. Speaking for the Court, Mr. Justice Cardozo said:

> "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error." [14]

I also receive comfort from the language contained in MR. JUSTICE FRANKFURTER'S concurring opinion in this case. He says that a state falls short of its obligation "when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time." In my view, this case is snugly embraced in his very clear statement of the law as I have always understood it until today.

Wade v. *Hunter,* 336 U. S. 684 (1949), is cited in support of the discretion of a trial judge "to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served." *Thompson* v. *United States,* 155 U. S. 271, 273–274 (1894), is likewise referred to in the majority opinion. I have no quarrel with either of these cases. In the *Wade* case, with which I agree, the court-martial trial was held in the midst of the campaign to overthrow the forces of Germany. There was a continuance in the trial to get certain wit-

[14] 302 U. S., at 328 (1937).

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nesses. Before that date was reached, there were further advances toward the enemy. The Army needed the officers participating in the trial for tactical purposes, and the court-martial was dissolved. In the *Thompson* case, after the jury was sworn and a witness testified, a member of the jury was found to be disqualified because he was a member of the Grand Jury which filed the indictment. The jury was discharged, and a plea of jeopardy was interposed at the second trial. Nothing was called to the attention of the prosecutor or the court that such a condition obtained or might have obtained. The plea of former jeopardy was overruled with cases cited. The Court said:

> "Those cases clearly establish the law of this court, that courts of justice are invested with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States." [15]

I submit there was no manifest necessity to discharge this jury after the State had proceeded to trial and offered all its evidence, and I submit that the ordering of a mistrial here for the convenience of the State does not promote the ends of public justice.

MR. JUSTICE DOUGLAS, dissenting.

In 1795, when the reasons for the guarantee against double jeopardy were still fresh in men's minds, a North Carolina court stated the basis for not allowing the prose-

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[15] *Thompson* v. *United States*, 155 U. S. 271, 274 (1894).

cution to have a jury discharged so that it could obtain better evidence against the accused.

"The rule as laid down in 3 Co. Inst., 110, and 1 Inst., 227, is general and without exception that a jury in a capital case cannot be discharged without giving a verdict. Afterwards, however, in the reigns of the latter sovereigns of the Stuart family, a different rule prevailed, that a jury in such case might be discharged for the purpose of having better evidence against him at a future day; and this power was exercised for the benefit of the crown only; but it is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country. In the time of James II., and since the Revolution, this doctrine came under examination,[*] and the rule as laid down by my

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*The strict rule, laid down by Coke, was departed from during the reign of the Stuarts (1603–1714), notably in the case of the treason trials of *Whitebread* and *Fenwick,* 7 How. St. Tr. 120 and 315. There the jury was discharged at the close of the Crown's evidence, because of the failure to satisfy the two-witness rule. The defendants were later retried after the prosecution had remedied the defect. See also 2 Hale's P. C. 294. This practice was condemned in 1746 as an example of the great abuse to which the power to discharge the jury is subject. See *Kinloch's Case,* 2 Foster's Reports 16, 22.

In 1698 in the time of Lord Holt, the judges formulated rules regarding the matter: "(1.) That in capital Cases a Juror cannot be withdrawn, tho' all Parties consent to it. (2.) That in criminal Cases, not capital, a Juror may be withdrawn, if both Parties consent, but not otherwise. (3.) And that in all civil Causes, a Juror cannot be withdrawn, but by Consent of all Parties." See Carthew's Reports 465.

Those rules were in time construed to be rules of practice or guides for the exercise of discretion, not rules of law, the breach of which entitled a defendant to plead former jeopardy. See *Queen* v. *Charlesworth,* 1 B. & S. 460; *Winsor* v. *Queen,* 118 Eng. C. L. R. 141; *Queen* v. *Lewis,* 2 Cr. App. R. 180. There is a review of this history in the dissenting opinion of Crampton, J., in *Conway* v. *Regina,* 7 Irish L. Rep. 149, 165 *et seq.*

Lord Coke was revived with this addition, that a jury should not be discharged in a capital case unless for the benefit of the prisoner; as if the prisoner be a woman and be taken in labor; or if the prisoner after the jury are charged with him be found to be insane, and the like; or if at the prisoner's request a jury be withdrawn to let him in to take the benefit of an exception, which otherwise he would have lost . . . . In the present case the jury were suffered by the court's officer to separate without giving a verdict. As they could not agree to convict, it is strong evidence of the party's innocence; and perhaps he could not be tried again with the same advantage to himself as then. Perhaps his witnesses are dead, or gone away, or their attendance not to be procured, or some accident may prevent their attendance. We will not again put his life in jeopardy, more especially as it is very improbable we shall be able to possess him of the same advantages." *State* v. *Garrigues,* 2 N. C. 241, 242.

That point of view should shape our conception of double jeopardy and due process of law. Once the prosecution can call a halt in the middle of a trial in order to await a more favorable time, or to find new evidence, or to make up the deficiencies in the testimony of its witnesses, the promise of protection against double jeopardy loses the great force it was thought to have when the Constitution was written. At that time the practices of the Stuarts were freshly in mind. And it was resolved that they should not reach these shores.

BROWN *v.* ALLEN, WARDEN.

NO. 32. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued April 29, 1952.—Reargued October 13, 1952.—Decided February 9, 1953.

1. Where, on direct review of his conviction, a state prisoner's claim of federal constitutional right has been decided adversely to him by the state supreme court and an application to this Court for certiorari has been denied, he has satisfied the requirement of 28 U. S. C. § 2254 that state remedies be exhausted before a federal court may grant an application for habeas corpus. Pp. 446–450.

   (a) It is not necessary in such circumstances that he pursue in the state courts a collateral remedy based on the same evidence and issues. Pp. 447–450.

   (b) Section 2254 is not to be construed as requiring repetitious applications to state courts for relief. P. 448, n. 3.

2. A denial of certiorari by this Court (with no statement of reasons therefor) to review a decision of a state supreme court affirming a conviction in a criminal prosecution should be given no weight by a federal court in passing upon the same petitioner's application for a writ of habeas corpus. (Opinion of MR. JUSTICE FRANKFURTER, stating the position of a majority of the Court on this point.) Pp. 489–497.

3. On a state prisoner's application for habeas corpus on federal constitutional grounds, the federal district court may take into consideration the proceedings and adjudications in the state trial and appellate courts. Pp. 457–458.

   (a) Where the state decision was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. P. 458.

   (b) Where there is material conflict of fact in the transcript of evidence as to deprivation of constitutional rights, the district court

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*Together with No. 22, *Speller* v. *Allen, Warden*, argued April 29, 1952, reargued October 13, 1952, and No. 20, *Daniels et al.* v. *Allen, Warden*, argued April 28–29, 1952, reargued October 13, 1952, also on certiorari to the same court.

may properly depend upon the state's resolution of the issue. P. 458.

(c) In other circumstances, the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues, although *res judicata* is not applicable. P. 458.

4. Although in each of these cases the District Court erroneously gave consideration to this Court's prior denial of certiorari, it affirmatively appears from the record that the error could not have affected the result, and such error may be and is disregarded as harmless. Fed. Rules Crim. Proc., 52. Pp. 458–460.
5. On the application of a state prisoner to a federal district court for habeas corpus, when the records of the state trial and appellate courts are before the district court, it is within the discretion of the district court whether to take evidence and hear argument on the federal constitutional issues; and the action of the district court in not taking evidence or hearing argument in the case here involved was not an abuse of that discretion. Pp. 460–465.
6. In 28 U. S. C. §§ 2243 and 2244, the word "entertain" means a federal district court's conclusion, after examination of the habeas corpus application with such accompanying papers as the court deems necessary, that a hearing on the merits, legal or factual, is proper. Pp. 460–461.
7. In No. 32, petitioner, a Negro, was not denied due process or equal protection in violation of the Fourteenth Amendment by the method of selecting grand and petit juries from lists limited by state statute to taxpayers, though the lists had a higher proportion of white than Negro citizens. Pp. 466–474.
8. In No. 32, petitioner was not denied due process by the admission in evidence against him of confessions not shown to have been coerced. Pp. 474–476.
9. In No. 22, petitioner, a Negro, did not show by clear evidence that, in the selection of jurors which was actually made in his case, there was discrimination based solely on race; and petitioner's conviction cannot be set aside on that ground as violative of the Equal Protection Clause of the Fourteenth Amendment. The comparatively small number of names of Negroes in the jury box was insufficient in itself to establish such discrimination. Pp. 477–482.
10. In No. 20, the State Supreme Court had refused review on the merits of petitioners' conviction and death sentence (challenged on federal constitutional grounds) because of petitioners' failure to perfect their appeal within the 60-day limit applicable under state

law, the appeal not having been perfected until the 61st day. *Held:* A failure to use a state's available remedy, in the absence of some interference or incapacity, bars federal habeas corpus. Pp. 482–487.

192 F. 2d 477, 763, affirmed.

For Opinion of the Court, see *post,* p. 446.

For notation of Mr. Justice Jackson, concurring in the result, see *post,* p. 487.

For notation of position of Mr. Justice Burton and Mr. Justice Clark, see *post,* p. 487.

For opinion of Mr. Justice Frankfurter as to the legal significance of this Court's denial of certiorari and the bearing of proceedings in state courts, on disposition of application for writ of habeas corpus in a federal district court, see *post,* p. 488.

For notation of position of Mr. Justice Black and Mr. Justice Douglas on the same two points, see *post,* p. 513.

For opinion of Mr. Justice Jackson, concurring in the result announced by the Opinion of the Court, see *post,* p. 532.

For dissenting opinion of Mr. Justice Black, joined by Mr. Justice Douglas, see *post,* p. 548.

For dissenting opinion of Mr. Justice Frankfurter, joined by Mr. Justice Black and Mr. Justice Douglas, see *post,* p. 554.

No. 32. Petitioner, a state prisoner, applied to the Federal District Court for habeas corpus, after his petition to this Court for certiorari to review the State Supreme Court's affirmance of his conviction had been denied. 341 U. S. 943. The District Court dismissed the application. 98 F. Supp. 866. The Court of Appeals affirmed. 192 F. 2d 477. This Court granted certiorari. 343 U. S. 903. The case was argued at the October 1951 Term, but was restored to the docket for reargument. 343 U. S. 973. *Judgment affirmed,* p. 487.

No. 22. Petitioner, a state prisoner, applied to the Federal District Court for habeas corpus, after his petition to this Court for certiorari to review the State Supreme Court's affirmance of his conviction had been denied. 340 U. S. 835. The District Court dismissed

the application. 99 F. Supp. 92. The Court of Appeals affirmed. 192 F. 2d 477. This Court granted certiorari. 342 U. S. 953. The case was argued at the October 1951 Term, but was restored to the docket for reargument. 343 U. S. 973. *Judgment affirmed,* p. 487.

No. 20. Petitioners, state prisoners, applied to the Federal District Court for habeas corpus, after this Court had denied their petition for certiorari to review the State Supreme Court's refusal to consider on the merits an appeal from their conviction. 339 U. S. 954. The District Court dismissed the application. 99 F. Supp. 208. The Court of Appeals affirmed. 192 F. 2d 763. This Court granted certiorari. 342 U. S. 941. The case was argued at the October 1951 Term, but was restored to the docket for reargument. 343 U. S. 973. *Judgment affirmed,* p. 487.

Hosea V. Price argued the cause for petitioner in No. 32. *Herman L. Taylor* filed a brief for petitioner.

Herman L. Taylor argued the cause and filed a brief for petitioner in No. 22.

O. John Rogge and *Murray A. Gordon* argued the cause for petitioners in No. 20. *Mr. Taylor* was with them on the brief.

R. Brookes Peters argued the cause for respondent in No. 32. *E. O. Brogden, Jr.* argued the cause for respondent in No. 22. *Ralph Moody,* Assistant Attorney General of North Carolina, argued the cause for respondent in No. 20. With them on the briefs was *Harry McMullan,* Attorney General.

Mr. Justice Reed delivered the opinion of the Court.

Certiorari was granted to review judgments of the United States Court of Appeals for the Fourth Circuit. 343 U. S. 903; 342 U. S. 953; 342 U. S. 941. These cases

were argued last year. As the records raised serious federal constitutional questions upon which the carrying out of death sentences depended and procedural issues of importance in the relations between states and the Federal Government upon which there was disagreement in this Court, we decided to set the cases for reargument. We have now heard the cases again.

The judgments of affirmance were entered October 12, 1951, on appeal from three judgments of the United States District Court for the Eastern District of North Carolina, refusing writs of habeas corpus sought by prisoners convicted in that state. We conclude that all required procedure for state review of the convictions had been exhausted by petitioners in each case before they sought the writs of habeas corpus in the federal courts. In each case petitions for certiorari to this Court for direct review of the state judgments rendered by the highest court of the state in the face of the same federal issues now presented by habeas corpus had been denied.[1]

It is not necessary in such circumstances for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review with another petition for certiorari directed to this Court.[2] It is to be noted that an applicant is barred unless he has "exhausted the remedies available in the courts of the State . . . by any available procedure." The legislative history shows that this paragraph, *in haec verba,* was presented to the Congress with the recommendation of

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[1] *Brown* v. *North Carolina,* 341 U. S. 943; *Speller* v. *North Carolina,* 340 U. S. 835; *Daniels* v. *North Carolina,* 339 U. S. 954.

[2] We reach this conclusion after consideration of the second paragraph of 28 U. S. C. § 2254:

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

the Judicial Conference. The legislative history of 28 U. S. C. § 2254 has no discussion of the considerations which moved congressional enactment other than that contained in S. Rep. No. 1559. But see a similar clause § 2254 in H. R. 3214, 80th Cong., 1st Sess.; H. R. 3214, 80th Cong., 2d Sess.; S. Rep. No. 1559, 80th Cong., 2d Sess., p. 9; Report of the Judicial Conference of Senior Circuit Judges, 1947, pp. 17–20.

The second paragraph of § 2254 has been construed by several courts of appeals. In *Ekberg* v. *McGee,* 191 F. 2d 625, the Ninth Circuit refused to consider that the statute meant to deny a federal forum where state procedures were inexhaustible. The Third Circuit in *Master* v. *Baldi,* 198 F. 2d 113, 116, held that the exhaustion of one of several available alternative state remedies with this Court's denial of certiorari therefrom is all that is necessary. In *Bacom* v. *Sullivan,* 181 F. 2d 177, and *Bacom* v. *Sullivan,* 194 F. 2d 166, the Fifth Circuit ruled that when a federal question had been presented to the state courts by at least one post-conviction procedure, certiorari on the same question having been once denied by this Court, there appeared a unique and extraordinary circumstance justifying federal examination under *Darr* v. *Burford,* 339 U. S. 200.[3]

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[3] Outside the cases, it has been strongly urged that the purpose of subparagraph 2 was to eliminate the right of a federal district court to entertain an application so long as any state remedy remained available. In an article by Chief Judge Parker, Chairman of the Judicial Conference Committee which drafted the new Habeas Corpus Act, *Limiting the Abuse of Habeas Corpus,* 8 F. R. D. 171, 176 (1949), this construction of § 2254 is presented:

"The effect of this last provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made for habeas corpus to the state courts; for, in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to

When, in April 1948, Judge Maris presented the Judicial Conference draft of § 2254 to the Senate Judiciary Subcommittee, the language of the revision of 28 U. S. C., on which the hearings were being held, set out three bases for exercise of federal jurisdiction over applications for habeas corpus from state prisoners. Under the language of the bill as it then read, an application might have been entertained where it appeared (1) that the applicant had exhausted the remedies available in the courts of the state, or (2) where there was no adequate remedy available in such courts, or (3) where such courts had denied the applicant a fair adjudication of the legality of his detention under the Constitution and laws of the United States. In accepting the recommendation of the Judicial Conference, the Congress eliminated the third basis of jurisdiction. S. Rep. No. 1559, p. 9, shows the reason for this as follows:

> "The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an unde-

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have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari."

We do not so construe § 2254. We do not believe Congress intended to require repetitious applications to state courts. § 2254 originally read as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court or authority of a State officer shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is no adequate remedy available in such courts or that such courts have denied him a fair adjudication of the legality of his detention under the Constitution and laws of the United States."

§ 2254 of H. R. 3214, 80th Cong., 2d Sess.

sirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

If the substitution for "adequate remedy available" of the present definition was intended by the Congress to eliminate the right of a state prisoner to apply for relief by habeas corpus to the lower federal courts, we do not think that the report would have suggested that a remedy for denial of a "fair adjudication" was in the federal court. The suggested elimination of district and circuit courts does not square with the other statutory habeas corpus provisions. See 28 U. S. C. §§ 2241, 2242, 2251, 2252, 2253, 3d paragraph. We are unwilling to conclude without a definite congressional direction that so radical a change was intended.

In each of these cases the District Court, in determining the propriety of its granting the writ, considered the effect of our refusal of certiorari on the same questions upon direct review of the judgments of the highest court of the state. As that question, pretermitted in our ruling in *Darr* v. *Burford,* 339 U. S. 200, 214–217, a case where no certiorari was sought here from state denial of collateral relief by habeas corpus from imprisonment, had given rise to definite differences of opinion in the federal

courts, a ruling here was necessary.[4] There is a similar difference in this Court.[5] As other issues command a majority that upholds the judgments of the Court of Appeals, this opinion is that of the Court although it represents the minority view on the effect of our denial

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[4] The courts below have divided since the *Darr* case on the effect to be accorded a denial of certiorari by this Court.

NO SUBSTANTIVE EFFECT

Goodman v. *Lainson,* 182 F. 2d 814.
McGarty v. *O'Brien,* 188 F. 2d 151.
Soulia v. *O'Brien,* 188 F. 2d 233.
Odell v. *Hudspeth,* 189 F. 2d 300.
Ekberg v. *McGee,* 191 F. 2d 625 (also reported at 194 F. 2d 178).
Sampsell v. *California,* 191 F. 2d 721.
Melanson v. *O'Brien,* 191 F. 2d 963.
Bacom v. *Sullivan,* 194 F. 2d 166.
Almeida v. *Baldi,* 195 F. 2d 815.
Hawk v. *Hann,* 103 F. Supp. 138.
Ex parte Wells, 99 F. Supp. 320.
Fouquette v. *Bernard,* 198 F. 2d 96.
Master v. *Baldi,* 198 F. 2d 113.
Daverse v. *Hohn,* 198 F. 2d 934.

DISCRETIONARY EFFECT

Anderson v. *Eidson,* 191 F. 2d 989.
Holland v. *Eidson,* 90 F. Supp. 314.
Pennsylvania ex rel. Gibbs v. *Ashe,* 93 F. Supp. 542.
Soulia v. *O'Brien,* 94 F. Supp. 764.
McGarty v. *O'Brien,* 96 F. Supp. 704.
Goodwin v. *Smyth,* 181 F. 2d 498.
Adkins v. *Smyth,* 188 F. 2d 452.
Byars v. *Swenson,* 192 F. 2d 739.
Frazier v. *Ellis,* 196 F. 2d 231.
Lyle v. *Eidson,* 197 F. 2d 327.
Skinner v. *Robinson,* 105 F. Supp. 153.

[5] The participation of a district court through habeas corpus proceedings in determining whether state prisoners have been granted a fair trial is a sensitive area in our federated system. *Speller* v. *Crawford,* 99 F. Supp. 92, 96; *Smith* v. *Baldi,* 192 F. 2d 540, 543.

In September 1952, at its fourth annual meeting, the Conference of Chief Justices adopted a resolution questioning the habeas corpus principles "enunciated in certain recent federal decisions." The resolution expressed the consensus of the Chief Justices that "a final judgment of a State's highest court [should] be subject to review or reversal only by the Supreme Court of the United States." Concern was noted that the hearing of the successive petitions by federal

of certiorari. The position of the majority upon that point is expressed by the opinion of MR. JUSTICE FRANKFURTER, *post*, p. 488. A summary review of habeas corpus practice in the federal courts in relation to state criminal convictions will be found in *Hawk* v. *Olson*, 326 U. S. 271, 274, and *Darr* v. *Burford*, 339 U. S. 200, 203. It is hoped the conclusions reached herein will result in the improvement of the administration of justice and leave the indispensable function of the Great Writ unimpaired in usefulness.

II. EFFECT OF FORMER PROCEEDINGS.

The effect to be given this Court's former refusal of certiorari in these cases was presented to the District Court which heard the applications for federal habeas corpus upon full records of the state proceedings in the trial and appellate courts. In No. 32, *Brown* v. *Allen*, the District Court, upon examination of the application, the answer, and the exhibits, adopted, without hearing argument or testimony, the findings of the sentencing judge with respect to both the composition of the grand jury and the voluntary character of the confession. These were the federal constitutional issues involved in the state trial. The record which the District Judge had before him embraced the record of the case in the North Carolina courts and this Court, including all the relevant portions of the transcript of proceedings in the sentencing court. The District Court then dismissed the petition. *Sub nom. Brown* v. *Crawford*, 98 F. Supp. 866.

In No. 22, *Speller* v. *Allen*, the petition for habeas corpus in the District Court raised again the same federal question which had been passed upon by the trial and ap-

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district courts would tend toward a dilution of the sense of judicial responsibility, a delay in the enforcement of criminal justice, and an impairment of confidence in state judicial institutions. 25 State Government, pp. 249–250.

pellate courts in North Carolina and which had been offered to this Court on petition for certiorari; to wit, the jury commissioners had "pursuant to a long and continuous practice, discriminated against Negroes in the selection of juries, solely on account of race and/or color." The District Court had before it the record which had been filed in the Supreme Court of North Carolina on appeal. Included in this record was the same transcript of proceedings in the trial court which had been before the State Supreme Court. In addition, the District Court took further evidence by way of testimony and stipulation. The District Court, upon examination of all the evidence and the stipulations, adopted the findings of the sentencing judge with respect to the composition of the trial jury. It added that petitioner "failed to substantiate the charge that he did not have a trial according to due process, ..." The court then vacated the writ; and held that while the petition could be dismissed "solely in the light of the procedural history," there was the added alternative ground of failure to substantiate the charge. *Sub nom. Speller* v. *Crawford,* 99 F. Supp. 92, 97.

In No. 20, *Daniels* v. *Allen,* petitioners at the state trial made a timely motion to quash the indictment and challenged the array, alleging discrimination against Negroes in the selection of both grand and petit jurors in contravention of the guarantees of the Fourteenth Amendment. Timely objection was also made to admission in evidence of what were alleged to be coerced confessions. Petitioners contend that the admission of these confessions violated their due process rights under the Fourteenth Amendment. They also urge that the refusal of the Supreme Court of North Carolina to examine the merits of the trial record in the state courts because of their failure to serve a statement of the case on appeal until one day beyond the period of limitation, is a denial of equal protection under the Fourteenth Amendment. In their

application to the District Court, petitioners repeated once again those federal constitutional questions which had earlier been presented to the sentencing court and the Supreme Court of North Carolina and which had also been repeated in their petition for certiorari filed in this Court.

In examining the application, the District Court Judge studied the records of the trial and appellate courts of North Carolina, including a transcript of the proceedings in the sentencing court. He concluded that the findings of the judge of the sentencing court on the matter of whether the jury had been properly selected were supported by all the evidence and that it was not shown that there was a purposeful and systematic exclusion of Negroes solely on account of race. He also found that the trial judge correctly determined that the confessions were voluntary and that the instruction concerning the confessions was adequate. In addition the District Judge heard all evidence offered by the prosecution or defense.

The District Court Judge did advert to the circumstance that this Court had denied a petition for certiorari on the same questions, and he further observed that to his mind the procedural history of the case did not make it appear that petitioners were denied the substance of a fair trial. He added that petitioners "failed to substantiate the charges made." 99 F. Supp. at 216. The writ was vacated and the application dismissed. On the procedural history, the District Court refused to entertain the request. *Sub nom. Daniels* v. *Crawford,* 99 F. Supp. 208.

The records of the former proceedings thus determined the action of the United States District Court. The fact that further evidence was heard in two of the cases was to assure the judge that the prisoners were not held in custody in violation of the Constitution. In dismissing these petitions for habeas corpus the District Court did not treat our denial of certiorari as conclusive.

In the *Brown* case, the last one decided, Judge Gilliam based his decision on this finding of fact:

> "12. The facts found by the trial Judge, in respect to the composition of the grand jury, are supported by the evidence before him, and these findings and the conclusion thereon are adopted as findings in this respect, and the facts found by that Court in respect to the question of admission of statements made by the defendant are also supported by the evidence, and these findings and the conclusions thereon are likewise adopted." 98 F. Supp. 866, 870.

The court cited from *Stonebreaker* v. *Smyth,* 163 F. 2d 498, 499, in support of the above statement that this is the proper rule:

> " 'While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus.' " 98 F. Supp. at 868.

In the *Speller* case, the pith of his conclusion is stated as follows:

> " 'The Court now concludes that the writ should be vacated and the petition dismissed upon the procedural history and the record in the State Courts, for the reason that habeas corpus proceeding is not available to the petitioner for the purpose of raising the identical question passed upon in those Courts.' " 99 F. Supp. 92, 95.

To this was added the alternative ground of agreement with the conclusions of the sentencing court. See pp. 452–453, *supra.*

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In the *Daniels* case, decided the same day, the District Court left open the question of its power to reexamine, 99 F. Supp. at 213, and concluded on the record that the State had afforded a fair trial.

A. *Effect of Denial of Certiorari.*—In cases such as these, a minority of this Court is of the opinion that there is no reason why a district court should not give consideration to the record of the prior certiorari in this Court and such weight to our denial as the District Court feels the record justifies. This is the view of the Court of Appeals. 192 F. 2d 763, 768 *et seq.; Speller* v. *Allen,* 192 F. 2d 477. This is, we think, the teaching of *Ex parte Hawk,* 321 U. S. 114, 118, and *White* v. *Ragen,* 324 U. S. 760, 764, 765. We have frequently said that the denial of certiorari "imports no expression of opinion upon the merits of a case." *House* v. *Mayo,* 324 U. S. 42, 48; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251, 258. Cf. *Ex parte Abernathy,* 320 U. S. 219. When on review of proceedings no *res judicata* or precedential effect follows, the result would be in accord with that expression, that statement is satisfied. But denial of certiorari marks final action on state criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in *Dorsey* v. *Gill,* 80 U. S. App. D. C. 9, 148 F. 2d 857, see 7 F. R. D. 313, the denial would make the issues *res judicata.* The minority thinks that where a record distinctly presenting a substantial federal constitutional question disentangled from problems of procedure is brought here by certiorari and denied, courts dealing with the petitioner's future applications for habeas corpus on the same issues presented in earlier applications for writs of certiorari to this Court, should have the power to take the denial into consideration in determining their action. We indicated as much in *House* v. *Mayo, supra,* p. 48, and *Ex parte Hawk, supra,*

p. 117, when we specifically approved a district court's refusal to reexamine ordinarily the questions passed upon by our denial. Permitting a district court to dismiss an application for habeas corpus on the strength of the prior record should be a procedural development to reduce abuse of the right to repeated hearings such as were permitted during the period when there was no review of the refusal of a habeas corpus application, *Salinger* v. *Loisel,* 265 U. S. 224. See 61 Harv. L. Rev. 657, 670. Compare the protection given by statute against abuse of habeas corpus in federal criminal proceedings, 28 U. S. C. § 2244. Since a federal district court has power to intervene, there is a guard against injustice through error. *Darr* v. *Burford, supra,* at 214. It should be noted that the minority does not urge that the denial of certiorari here is *res judicata* of the issues presented. It is true, as is pointed out in the opinion of MR. JUSTICE FRANKFURTER, the records of applications for certiorari to review state criminal convictions, directly or collaterally, through habeas corpus or otherwise, are not always clear and full. Some records, however, are. It seems proper for a district court to give to these refusals of certiorari on adequate records the consideration the district court may conclude these refusals merit. This would be a matter of practice to keep pace with the statutory development of 1867 that expanded habeas corpus. We think it inconsistent to allow a district court to dismiss an application on its appraisal of the state trial record, as we understand those do who oppose our suggestion (see MR. JUSTICE FRANKFURTER'S opinion, *post,* pp. 500–501 and 503–506), but to refuse to permit the district court to consider relevant our denial of certiorari.

B. *Effect of State Court Adjudications.*—With the above statement of the position of the minority on the weight to be given our denial of certiorari, we turn to another question. The fact that no weight is to be given

by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. *A fortiori,* where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. *Mooney* v. *Holohan,* 294 U. S. 103; *Ex parte Hawk,* 321 U. S. 114. Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue. *Malinski* v. *New York,* 324 U. S. 401, 404. In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata.*[6]

Furthermore, in view of the consideration that was given by the District Court to our denial of certiorari in these cases, should we return them to that court for reexamination in the light of this Court's ruling upon the effect to be given to the denial? We think not. From the findings of fact and the judgments of the District Court we cannot see that such consideration as was given by that court to our denials of certiorari could have had any effect on its conclusions as to whether the respective defendants had been denied federal constitutional protec-

[6] As the burden of overturning the conviction rests on the applicant, he should allege specifically, in cases where material, the uncontradicted evidentiary facts appearing in the record upon which is based his allegation of denial of constitutional rights.

tion.[7] It is true, under the Court's ruling today, that the District Court in each of the three cases erroneously gave consideration to our denial of certiorari. It is also true that its rulings, set out above, show that without that consideration, it found from its examination of the state records and new evidence presented that the conduct of the respective state proceedings was in full accord with due process. Such conclusions make immaterial the fact that the trial court gave consideration to our denial of certiorari.

The District Court and the Court of Appeals recognized the power of the District Court to reexamine federal constitutional issues even after trial and review by a state and refusal of certiorari in this Court. *Darr* v. *Burford,* 339 U. S., at 214. The intimation to the contrary in the *Speller* case, 99 F. Supp., at 95, see p. 453, *supra,* must be read as the Court's opinion after the hearing. "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."[8] Certainly the consideration given by the District Court to our former refusals of certiorari on the issues presented cannot affect its determinations that there was no merit in any of the applications for habeas corpus. 98 F. Supp. 868, 870; 99 F. Supp.

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[7] The applicable Rule 61 of the Fed. Rules Civ. Proc. is as follows:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

[8] *Helvering* v. *Gowran,* 302 U. S. 238, 245. See *Riley Co.* v. *Commissioner,* 311 U. S. 55, 59.

97, 99; 99 F. Supp. at 216. Where it is made to appear affirmatively, as here, that the alleged error could not affect the result, such errors may be disregarded even in the review of criminal trials.[9] Whether we affirm or reverse in these cases, therefore, does not depend upon the trial court's consideration of our denial of certiorari but upon the soundness of its decisions upon the issues of alleged violation of federal procedural requirements or of petitioner's constitutional rights by the North Carolina proceedings. We now take up those problems.

III. Right to Plenary Hearing.

Petitioner alleges a procedural error in No. 32, *Brown* v. *Allen*. As we stated in the preceding subdivision, the writ of habeas corpus was refused on the entire record of the respective state and federal courts. 98 F. Supp. 866. It is petitioner's contention, however, that the District Court committed error when it took no evidence and heard no argument on the federal constitutional issues. He contends he is entitled to a plenary trial of his federal constitutional issues in the District Court. He argues that the Federal District Court, with jurisdiction of the particular habeas corpus, must exercise its judicial power to hear again the controversy notwithstanding prior determinations of substantially identical federal issues by the highest state court, either on direct review of the conviction or by post-conviction remedy, habeas corpus, coram nobis, delayed appeal or otherwise.[10]

Jurisdiction over applications for federal habeas corpus is controlled by statute.[11] The Code directs a court en-

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[9] Rule 52, Fed. Rules Crim. Proc.; *Berger* v. *United States*, 295 U. S. 78, 81–84. See *Kotteakos* v. *United States*, 328 U. S. 750, 763; *Bihn* v. *United States*, 328 U. S. 633.

[10] See note 15, *infra*.

[11] 28 U. S. C. § 2241 (a).

tertaining an application to award the writ.[12] But an application is not "entertained" by a mere filing. Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief.[13]

The word "entertain" presents difficulties. Its meaning may vary according to its surroundings.[14] In § 2243 and § 2244 we think it means a federal district court's conclusion, after examination of the application with such accompanying papers as the court deems necessary, that a hearing on the merits legal or factual is proper. See *Walker* v. *Johnston,* 312 U. S. 275, 283, First and Second; *Smith* v. *Baldi, post,* p. 561, at p. 568. Even after deciding to entertain the application, the District Court may determine later from the return or otherwise that the hearing is unnecessary.

It is clear by statutory enactment that a federal district court is not required to entertain an application for habeas corpus if it appears that "the legality of such detention has been determined by a judge or court of the

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[12] 28 U. S. C. § 2243:

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. . . .

. . . . . .

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

. . . . . .

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

[13] 28 U. S. C. § 2242. *Darr* v. *Burford, supra,* p. 203. See § 2243, *supra.*

[14] See *Denholm & McKay Co.* v. *Commissioner,* 132 F. 2d 243, 247, and cases cited.

United States on a prior application for a writ of habeas corpus." [15] The Reviser's Notes to this section in House Report No. 308, 80th Cong., 1st Sess., say that no material change in existing practice is intended. Nothing else indicates that the purpose of Congress was to restrict by the adoption of the Code of 1948 the discretion of the District Court, if it had such discretion before, to entertain petitions from state prisoners which raised the same issues raised in the state courts.[16]

Furthermore, in enacting 28 U. S. C. § 2254, dealing with persons in custody under state judgments, Congress made no reference to the power of a federal district court over federal habeas corpus for claimed wrongs previously passed upon by state courts.[17] See discussion at p. 447, *supra*. A federal judge on a habeas corpus application is required to "summarily hear and determine the facts, and dispose of the matter as law and justice require," 28 U. S. C. § 2243. This has long been the law. R. S. § 761,

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[15] 28 U. S. C. § 2244:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." See S. Rep. No. 1559, 80th Cong., 2d Sess., Amendment No. 45.

[16] See H. R. 4232, 79th Cong., 1st Sess.; H. R. 3214, 80th Cong., 1st Sess.; H. R. 3214, 80th Cong., 2d Sess.; Report of the Judicial Conference of Senior Circuit Judges, 1947, pp. 17–20.

[17] 28 U. S. C. § 2254:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of

old 28 U. S. C. § 461. It was under this general rule that this Court approved in *Salinger* v. *Loisel,* 265 U. S. 224, 231, the procedure that a federal judge might refuse a writ where application for one had been made to and refused by another federal judge and the second judge is of the opinion that in the light of the record a satisfactory conclusion has been reached.[18] That principle is also applicable to state prisoners. *Darr* v. *Burford, supra,* 214–215.

Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required. See p. 457, *supra.* However, a trial may be had in the discretion of the federal

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circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[18] The reason for the change in procedure was stated:

"But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed,—just as when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on *habeas corpus* came to be relatively narrowed." *Id.,* at 230–231.

court or judge hearing the new application. A way is left open to redress violations of the Constitution. See p. 447, *supra*. *Moore* v. *Dempsey*, 261 U. S. 86. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected.[19] It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice.

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[19] When an application for habeas corpus by a state prisoner is filed in a federal district court after the exhaustion of state remedies, including a certiorari to this Court, it rests on a record that was made in the applicant's effort to secure relief through the state from imprisonment, allegedly in violation of federal constitutional rights. The District Court, a court convenient to the place of litigation, 28 U. S. C. § 2241 (b), after determining grounds for relief are stated in the petition, "may require a showing of the record and action on prior applications." *Darr* v. *Burford*, *supra*, at 215; *Salinger* v. *Loisel*, 265 U. S. 224, 232; cf. *Ex parte Elmer Davis*, 318 U. S. 412. Original records in state courts are returned by this Court. (*E. g.*, see in *Daniels* v. *North Carolina*, 339 U. S. 954, the order of THE CHIEF JUSTICE of the United States, dated May 12, 1950, as the same remains upon the files of this Court, directing, on the application of petitioner's counsel, the return of the original record from the files of this Court to the Supreme Court of North Carolina.) Copies of petitions for certiorari are normally available to petitioners. See 28 U. S. C. § 2250. Other sections strengthen the ability of the court hearing the application fully to advise itself concerning prior hearings of the same issues for the applicant. 28 U. S. C. § 2245 allows a certificate as to certain facts; § 2246 provides for depositions and affidavits. Section 2247 makes liberal provision for the use of records of former proceedings in evidence. See also §§ 2248–2254, inclusive. Of course, the other usual methods of completing the record in civil cases, such as subpoena *duces tecum* and discovery, are generally available to the applicant and respondent. If useful records of prior litigation are difficult to secure or unobtainable, the District Court may find it necessary or desirable to hold limited hearings to supply them where the allegations of the application for habeas corpus state adequate grounds for relief.

Cf. 28 U. S. C. § 2244. See n. 15, *supra*. As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. See *White* v. *Ragen*, 324 U. S. 760, 764.

As will presently appear, this case involves no extraordinary situation. Since the complete record was before the District Court, there was no need for rehearing or taking of further evidence. Treating the state's response to the application as a motion to dismiss, the court properly granted that motion. Discharge from conviction through habeas corpus is not an act of judicial clemency but a protection against illegal custody.

The need for argument is a matter of judicial discretion. All issues were adequately presented. There was no abuse.

IV. Disposition of Constitutional Issues.

Next we direct our attention to the records which were before the District Court in order to review that court's conclusions that North Carolina accorded petitioners a fair adjudication of their federal questions. Questions of discrimination and admission of coerced confessions lie in the compass of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Have petitioners received hearings consonant with standards accepted by this Nation as adequate to justify their convictions? *Hebert* v. *Louisiana*, 272 U. S. 312; *Adamson* v. *California*, 332 U. S. 46.

First. We take up *Brown* v. *Allen,* No. 32, a case that turns more generally than the others on the constitutional issues.

Petitioner, a Negro, was indicted on September 4, 1950, and tried in the North Carolina courts on a charge of rape, and, having been found guilty, he was sentenced to death on September 15, 1950. In the sentencing court petitioner made a timely motion to quash the bill of indictment, alleging discrimination against Negroes in the selection of grand jurors in contravention of the guarantees of the Fourteenth Amendment to the Federal Constitution. After the verdict, but before sentencing, petitioner, by a motion to set aside the verdict, sought to expand his constitutional attack on the selection of the grand jury to embrace the petit jury also. On appeal the State Supreme Court treated, as we do, petitioner's motions as adequate to challenge the selection of both juries. 233 N. C. 202, 205–206, 63 S. E. 2d 99, 100–101. A second federal question was raised in the sentencing court when petitioner opposed admission into evidence of a confession which he alleged had been given involuntarily. Following sentencing, petitioner took an appeal to the State Supreme Court and there presented for review the issues of jury discrimination and admission of a coerced confession. On this appeal, that court had before it both a brief on behalf of petitioner and a transcript of all those portions of the sentencing court proceedings which petitioner deemed relevant to a review of his federal questions.[20] Dealing with the federal constitutional questions on their merits, the State Supreme Court

[20] Rule 19 of the Rules of the Supreme Court of North Carolina permits an appellant to bring up on appeal as much of the record as is necessary "to an understanding of the exceptions relied on." Petitioner does not contend that the record before the Supreme Court of North Carolina was inadequate fully to support an adjudication on his federal questions.

affirmed the conviction. *State* v. *Brown,* 233 N. C. 202, 63 S. E. 2d 99.

A. Petitioner's charge of discrimination against Negroes in the selection of grand and petit jurors in violation of his constitutional rights attacks the operation of a method used by North Carolina in selecting juries in Forsyth County. The statutes detailing the method of selection are cited below.[21] It is petitioner's contention that no more than one or two Negroes at a time have ever served on a Forsyth County grand jury and that no more than five Negroes have ever previously served on a petit jury panel in the county. These contentions are the basis of the allegation that a system of discrimination is being employed against the Negro residents of the county. Petitioner offered no evidence to support his charge of limitation against the jury service of Negroes, except the fact that fewer Negroes than whites, having regard for their proportion of the population, appeared on the jury panels.

The 1940 Census shows the following figures in respect to the population of Forsyth County.

	Population	*Percent*	*21 Plus*	*Percent*
White	85,323	67.5	50,499	66.5
Negro	41,152	32.5	25,057	33.5
Total	126,475	100.0	75,556	100.0

According to the unchallenged testimony of the IBM Supervisor in the office of the Tax Supervisor of Forsyth County, a list of names is compiled from a tabulation of all the county property and poll taxpayers who make returns and is thereafter tendered to the County Commissioners for use in jury selection. All males

[21] See Chapter 206, 1937 Public-Local Laws (as amended by Chapter 264, 1947 N. C. Session Laws, and as amended by Chapter 577, 1949 N. C. Session Laws). And Gen. Stats. of N. C., 1943, c. 9, Arts. 1–4, as amended.

between 21 and 50 years of age are required to list themselves for poll tax as well as to list their property. Gen. Stat. of North Carolina, Recompiled 1950, §§ 105–307, 105–341. In 1948, Winston Township, the most heavily populated in Forsyth County, had 7,659 white males and 2,752 colored males who listed polls. In the County of Forsyth outside Winston Township, 10,319 white males and 587 colored males listed polls. This indicates that Negroes number approximately 16% of the listed taxpayers. No figures appear in the record of the percentage of Negroes on the property tax lists.

In June 1949, a list of approximately 40,000 names compiled from all the tax lists was handed to the Commissioners by the office of the Tax Supervisor. There is uncontradicted testimony by the IBM Supervisor that the list of jurors was prepared without regard to color, and that it constituted a complete compilation of the names of all resident, adult, listed taxpayers of Forsyth County. Both the grand and petit jury panels employed in this case were drawn from that pool. All the names on that list and no others (the list having been cut up into individual slips of uniform size bearing only one person's name) were put into a jury box. The selection from the jury box of names of persons subject to a summons to serve as grand jurors in a term of court is made by lot, as is the selection of panels of persons subject to summons for duty on petit juries. As the drawings were made by a small child and recorded in public there is no claim or evidence of chicanery in the drawings.

Grand jurors in Forsyth County are selected in January and July for a six months' term. See c. 206, 1937 Public-Local Laws, as amended by c. 264, 1947 N. C. Session Laws, as amended by c. 577, 1949 N. C. Session Laws. A panel of 60 names is drawn from the jury box each December and June by a child in the presence of the County Commissioners. At the June 5, 1950, meeting of the

Commissioners, 60 names were drawn. These 60 names constituted the panel of persons subject to summons for service on the grand jury which returned the indictment against petitioner. After such a drawing, a jury order is immediately prepared and given to the sheriff, who then summons all the parties he can find to appear for drawings for grand or petit jury service, as the case may be. All persons whose names were drawn were summoned if they could be found. Although there is no evidence as to how many persons were summoned by the sheriff, there is evidence to show that at least four or five Negroes were summoned. The final drawing for grand jury service is conducted in the courtroom in the presence of the Superior Court Judge. When the July 1950 grand jury was selected from the panel of 60, the drawing was again made by a child. The names of all the persons summoned by the sheriff were put into a special section of the jury box and the 18-man grand jury was then drawn. The name of one of the four or five Negroes summoned was drawn in the group of 18, and that Negro served on the grand jury. The remaining names are used for the petit jury panel.

When they are needed, petit jury panels in Forsyth County are drawn from the same jury box in groups of 44 persons. C. 206, Public-Local Laws, *supra*. After a drawing, the names are given to a deputy sheriff who then summons those persons on the list whom he can find. On the lists supplied to the deputies there are no indications as to whether the persons named are Negro or white. According to the statute all summoned persons must report for jury service. At the selection of the petit jurors for the trial of this case 8 of the 37 persons summoned on the panel were Negroes, as were 3 of a special venire of 20. Challenges, peremptory or for cause, eliminated all Negroes. No objections are made to the legality of these challenges. Uncontradicted evidence by a state witness

shows that in the two years 1949 and 1950 the percentages of Negroes drawn on grand jury panels in Forsyth County varied between 7% and 10% of all persons drawn. In 1950 the percentage of Negroes drawn on petit jury panels varied between 9% and 17% of all persons drawn.

Prior to 1947, the jury list was composed of those taxpayers who had "paid all the taxes assessed against them for the preceding year." N. C. Gen. Stat., 1943, § 9–1; cf. *State* v. *Davis,* 109 N. C. 780, 14 S. E. 55; *State* v. *Dixon,* 131 N. C. 808, 44 S. E. 944. This requirement has now been removed, as is shown by comparing the earlier statutes with the present wording of § 9–1 which was put into law in 1947. No change was made in the duty of all males between 21 and 50 to list their polls for assessment nor of the requirement for the county to collect an annual poll tax. Gen. Stat. §§ 105–307, 105–336, 105–339, 105–341; cf. *State* v. *Brown,* 233 N. C. 202, 205, 63 S. E. 2d 99, 100–101. The pool of eligible jurors was thus enlarged. This enlargement and the practice of selecting jurors under the new statute worked a radical change in the racial proportions of drawings of jurors in Forsyth County. As is shown by the record in this Court of *Brunson* v. *North Carolina,* 333 U. S. 851, tried in North Carolina in October, 1946, Forsyth County with its large Negro population, at that time had a jury pool of 10,622 white and 255 colored citizens. At that time a sheriff, then in office for 10 years, testified that he had summoned only about twelve Negroes for jury service in that time. In 1949, the jury box was purged. All those listing taxes and eligible were listed for jury service with the result in this case shown above.

Discriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution. This has long been accepted as the law. *Brunson* v. *North Carolina,* 333 U. S. 851; *Cassell* v. *Texas,* 339 U. S. 282, 286–

287; *State* v. *Peoples,* 131 N. C. 784, 42 S. E. 814. Such discrimination is forbidden by statute, 18 U. S. C. § 243, and has been treated as a denial of equal protection under the Fourteenth Amendment to an accused, of the race against which such discrimination is directed. *Neal* v. *Delaware,* 103 U. S. 370. The discrimination forbidden is racial discrimination, however, directed to accomplish the result of eliminating or limiting the service of the proscribed race by statute or by practice. *Smith* v. *Texas,* 311 U. S. 128; *Patton* v. *Mississippi,* 332 U. S. 463. It was explained in 1880 by this Court, when composed of justices familiar with the evils the Amendment sought to remedy, as permitting a state to "confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications." *Strauder* v. *West Virginia,* 100 U. S. 303, 310. Cf. *Franklin* v. *South Carolina,* 218 U. S. 161, 167–168; *Fay* v. *New York,* 332 U. S. 261, 268–272. While discriminations worked by consistent exclusion have been rigorously dealt with, *Neal* v. *Delaware,* 103 U. S. 370; *Carter* v. *Texas,* 177 U. S. 442; *Norris* v. *Alabama,* 294 U. S. 587; *Pierre* v. *Louisiana,* 306 U. S. 354; *Hill* v. *Texas,* 316 U. S. 400; *Patton* v. *Mississippi,* 332 U. S. 463, variations in proportions of Negroes and whites on jury lists from racial proportions in the population have not been considered violative of the Constitution where they are explained and not long continued. *Akins* v. *Texas,* 325 U. S. 398, 403. Of course, token summoning of Negroes for jury service does not comply with equal protection, *Smith* v. *Texas,* 311 U. S. 128. Nor can a race be proscribed as incompetent for service, *Hill* v. *Texas,* 316 U. S. 400.

Responsible as this Court is under the Constitution to redress the jury packing which Bentham properly characterized as a sinister species of art, Bentham, Elements of the Art of Packing as Applied to Special Juries, p. 6,

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it should not condemn good faith efforts to secure competent juries merely because of varying racial proportions.

The Supreme Court of North Carolina concluded that objection to the lists based on the racial composition of the tax lists was "far-fetched" and that it was not a racial discrimination when a list which included only taxpayers was used. *State* v. *Brown*, 233 N. C. 202, 63 S. E. 2d 99.[22]

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[22] In addition to North Carolina, the following states are among those which also base the composition of jury lists on tax lists:

Colo. Stat. Ann., 1952 Replacement, c. 95, § 10 (may use tax list);

Ga. Code Ann., 1951, § 59.106 (jury commissioners "shall select from the books of the tax receiver");

Kan. Gen. Stat., 1949, c. 43 ("select from those assessed on the assessment roll of the preceding year");

Ky. Rev. Stat., 1948, § 29.070 (last returned tax commissioner's book);

Md. Ann. Code, 1939, Art. 51, ¶ 6 (from a "complete list of male taxable inhabitants . . . whose names appear on the tax books");

Mich. Stat. Ann., 1938 and 1951, §§ 27.246 and 27.247 (select from "persons assessed on the assessment roll"; provides for additional names);

Mont. Rev. Code, 1947, Tit. 93, § 1402 ("select, from the last assessment roll of the county");

McKinney's N. Y. Laws, Judiciary Law, § 502 (1948) (own real property $150, or personal property $250, or married to someone who does; jurors in counties outside of cities having a population of one million or more). McKinney's N. Y. Laws, Judiciary Law, § 596;

N. D. Rev. Code, 1943, § 27–0906 ("The names on the assessors' lists . . . for the preceding year shall be the basis for making" an apportionment of the 200 names per county to the various cities and towns within the county);

Okla. Stat. Ann., 1951, Tit. 38, § 18 (jury lists shall be selected from the names on the tax rolls of the county);

Ore. Comp. Laws Ann., 1940, § 14–201 (make a jury list, "as far as it may be able to ascertain the same from the latest tax roll and/or registration books of the county");

Utah Code Ann., 1943, § 48–0–17 ("select from the names of the legal voters on the assessment roll . . .");

Remington's Wash. Rev. Stat., 1932, § 94 (no person is competent

We recognize the fact that these lists have a higher proportion of white citizens than of colored, doubtless due to inequality of educational and economic opportunities. While those who chose the names for the jury lists might have included names other than taxpayers, such action was not mandatory under state law. *State* v. *Brown,* 233 N. C. 202, 205, 63 S. E. 2d 99, 100. As only property and poll tax lists were used, see p. 467, *supra,* this case presents a jury selection as though limited by statute to all property owners and voters. We assume only reasonable tax levies were used. It is to be noted all males between 21 and 50 must list both property, however modest in amount, and polls, see pp. 467–468, *supra,* so that in that sense there is no exclusion on racial grounds. The name of every property owner and every voter is in the jury box. We recognize, too, that we are now reviewing a constitutional objection to a state court conviction, and we may not act to alter practices of a state which are short of a denial of equal protection or due process in the selection of juries.[23] States should decide for themselves the quality of their juries as best fits their situation so long as the classifications have relation to the efficiency of the jurors and are equally administered.

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to serve as a juror unless he be (1) an elector and taxpayer of the state);

Wyo. Comp. Stat., 1945, § 12–101 (4) (a person is competent if he be (4) assessed on the last assessment roll of the county).

See also Morse, A Survey of the Grand Jury System, Part 2, 10 Ore. L. Rev. 217, 227 (1931). The answers to the questionnaires sent out by Mr. Morse indicated that in twenty-two states the names for the grand jury lists were selected from county tax rolls or assessment rolls.

[23] Rules dealing with the selection of juries in federal courts, as announced in *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 221, are not applicable in state court proceedings. *Fay* v. *New York,* 332 U. S. 261, 287.

Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty. Short of an annual census or required population registration, these tax lists offer the most comprehensive source of available names. We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use require a conclusion of unconstitutionality. Assuming that before the *Brunson* case, 333 U. S. 851, there were unconstitutional exclusions of Negroes in this North Carolina county, the present record does not show such exclusions in this case. The evidence is to the contrary. The District Court correctly determined this issue as to the grand jury. As both the grand and petit juries in this case were drawn from the same filling of the jury box, the reasoning of the District Court is applicable to the petit jury here involved.

B. Petitioner contends further that his conviction was procured in violation of the Fourteenth Amendment of the Federal Constitution because the trial judge permitted the jury to rely on a confession claimed by petitioner to be coerced in determining his guilt. At the trial petitioner registered timely objection to use by the state of his purported confessions. The objection having been made, the trial judge immediately excused the jury and ordered a preliminary examination to determine whether or not the statements were voluntary. It was in this preliminary hearing, in which the petitioner and two police officers testified, that the admitted facts were first developed upon which petitioner rests this phase of his case. After hearing the testimony, the trial judge found that the petitioner's statements were freely and voluntarily given and declared them to be competent.

Upon recall of the jury, the state introduced the statements in evidence, objections again being noted. Although the petitioner chose not to take the stand in the trial of his cause, his counsel, while cross-examining the officers who had taken the challenged statements from the petitioner, developed again for the jury all the facts upon which petitioner now relies.

A conviction by a trial court which has admitted coerced confessions deprives a defendant of liberty without due process of law. *Brown* v. *Mississippi,* 297 U. S. 278, 280, 286–287. When the facts admitted by the state show coercion, *Ashcraft* v. *Tennessee,* 327 U. S. 274, a conviction will be set aside as violative of due process. *Chambers* v. *Florida,* 309 U. S. 227. This is true even though the evidence apart from the confessions might have been sufficient to sustain the jury's verdict. *Malinski* v. *New York,* 324 U. S. 401; see *Lyons* v. *Oklahoma,* 322 U. S. 596, 597.

Therefore, it does not matter in this case whether or not the jury was acquainted with all the facts laid before the judge upon which petitioner now relies or whether the jury heard or did not hear the petitioner testify. Neither does it matter that there possibly is evidence in the record independent of the confessions which could sustain the verdict. The mere admission of the confessions by the trial judge constituted a use of them by the state, and if the confessions were improperly obtained, such a use constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment. In determining whether a confession has been used by the state in violation of the constitutional rights of a petitioner, a United States court appraises the alleged abuses by the facts as shown at the hearing or admitted on the record.

Petitioner's contention that he had a constitutional right to have his statements excluded from the record rests upon these admitted facts. He is an illiterate.

He was held after arrest for five days before being charged with the crime for which he was convicted. He was not given a preliminary hearing until 18 days after his arrest. No counsel was provided for him in the period of his detention. The alleged confessions were taken prior to the preliminary hearing and appointment of counsel. There is no record of physical coercion or of that less painful duress generated by prolonged questioning. There is evidence that petitioner was told he could remain silent and that any statement he might make could be used against him. He chose to speak, and he made that choice without a promise of reward or immunity having been extended. He was never denied the right to counsel of his choice and was never without competent counsel from the inception of judicial proceedings. If the delay in the arraignment of petitioner was greater than that which might be tolerated in a federal criminal proceding, due process was not violated. Under the leadership of this Court a rule has been adopted for federal courts, that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. *McNabb* v. *United States,* 318 U. S. 332; *Upshaw* v. *United States,* 335 U. S. 410. Cf. *Allen* v. *United States,* 91 U. S. App. D. C. 197, 202 F. 2d 329. This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance. But the federal rule does not arise from constitutional sources. The Court has repeatedly refused to convert this rule of evidence for federal courts into a constitutional limitation on the states. *Gallegos* v. *Nebraska,* 342 U. S. 55, 63–65. Mere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained. Petitioner's constitutional rights were not infringed by the refusal of the trial court to exclude his confessions as evidence.

Second. We examine the constitutional issues in No. 22, *Speller* v. *Allen.*

Petitioner, a Negro, was indicted and in August, 1949, tried in the Superior Court of Bertie County, North Carolina, upon a charge of rape. He has been convicted and sentenced to death on this charge three times, the first two convictions having been set aside on appeal by the Supreme Court of North Carolina on the ground of discriminatory selection of jurors. *State* v. *Speller,* 229 N. C. 67, 47 S. E. 2d 537; 230 N. C. 345, 53 S. E. 2d 294. At this, his third trial, August Term 1949, petitioner made a timely motion to set aside the array of special veniremen called from Vance County, alleging discrimination against Negroes "solely and wholly on account of their race and/or color" in the selection of the veniremen in contravention of the guarantees of the Fourteenth Amendment of the Federal Constitution. (Transcript of Record, *State* v. *Speller,* August Term 1949, Bertie N. C. Superior Court at 12, Item 91, Clerk's Record, Supreme Court of the United States.) Evidence was taken at length on this issue, although some evidence deemed material by petitioner was excluded. In particular, the trial judge, on the ground that it would be immaterial, *infra,* p. 480, refused to permit petitioner to produce evidence as to all the scrolls in the jury box for the purpose of showing the existence of dots on the scrolls bearing the names of Negroes. The jury box was produced in court, opened, and counsel for defendant permitted to examine the scrolls. The trial judge made findings relating to the manner of selecting the veniremen, determining that no discrimination was practiced, and on these findings denied the motion to set aside the array. Petitioner was thereafter convicted for the third time, and sentenced to death.

On appeal petitioner asserted that his conviction violated the Equal Protection Clause of the Fourteenth

Amendment, assigning the denial of his motion to set aside the array as error, and also assigning as error the trial court's ruling on his request for permission to examine into all the scrolls in the jury box. The Supreme Court of North Carolina had before it on that appeal as part of the record a mimeographed, narrative-style transcript of the entire proceedings below; petitioner makes no objection to the absence of any relevant evidence on that appeal, except that relating to all the scrolls which had been excluded by the trial court. Upholding the rulings of the trial court, the Supreme Court of North Carolina affirmed the conviction, 231 N. C. 549, 57 S. E. 2d 759.

Petitioner filed this petition for a writ of habeas corpus in the Federal District Court for the Eastern District of North Carolina after we denied certiorari on direct review of the state proceedings. The petition summarily recited the prior history of the litigation, and raised again the same federal question which had been passed upon by both North Carolina courts, and which had been offered to this Court on petition for certiorari, racial discrimination. The District Court heard all additional evidence the petitioner offered. This was in its discretion. *Moore* v. *Dempsey,* 261 U. S. 86; *Darr* v. *Burford,* 339 U. S., at 214, cases which establish the power of federal district courts to protect the constitutional rights of state prisoners after the exhaustion of state remedies. It better enabled that court to determine whether any violation of the Fourteenth Amendment occurred.

Petitioner's charge of discrimination against Negroes in the selection of petit jurors in violation of his constitutional rights attacks the operation of the system used by the North Carolina authorities to select juries in Vance County, from which county a special venire was obtained to try petitioner. The charge rests on petitioner's contentions (1) that no Negro within recent

years had served on a jury in Vance County before this case, (2) that no Negro had been summoned to serve on a jury before this case, and (3) that the jury box in this case was so heavily loaded with names of white persons that the drawing could not fairly reflect a cross-section of those persons in the community qualified for jury service. Petitioner offered evidence to support each of these three contentions.

The evidence establishes the correctness of contentions (1) and (2). They are inapplicable to this case, however, under the circumstances of the filling of this particular jury box. As is pointed out in *Brown* v. *Allen, supra,* at page 470, North Carolina in 1947 enlarged its pool of citizens eligible for jury service. General Statutes, North Carolina, § 9–1. In Vance County, where the special venire for Speller's trial was drawn, the names of substantial numbers of Negroes appeared thereafter in the jury box. 145 Negroes out of a total of 2,126 names were in this jury box. As this venire was the first drawing of jurors from the box after its purge in July 1949, following the new statute and *Brunson* v. *North Carolina,* 333 U. S. 851, decided here March 15, 1948, the long history of alleged discrimination against its Negro citizens by Vance County jury commissioners is not decisive of discrimination in the present case. Former errors cannot invalidate future trials. Our problem is whether this venire was drawn from a jury box invalidly filled as to Speller because names were selected by discriminating against Negroes "solely on account of race and/or color." It is this particular box that is decisive, cf. *Cassell* v. *Texas,* 339 U. S. 282, 290 and 295. Past practice is evidence of past attitude of mind. That attitude is shown to no longer control the action of officials by the present fact of colored citizens' names in the jury box.

It is suggested that the record shows that the names of colored persons in the jury box were marked with a dot or period on the scroll. This could be used for unlawful disposition of such scrolls when drawn. Such a scheme would be useless in the circumstances of this case. The record shows that the defendant and his counsel were present when the venire was drawn by a child, aged 5. All of the names drawn were given to the sheriff and summonses were issued. As a matter of fact the special venire contained the names of seven Negroes. Four appeared. None sat as jurors. Therefore the assertion as to the dots, even if true, means no more than that some unknown person desired to interfere with the fair drawing of juries in Vance County. The trial court found against petitioner on this question. The District Court pointed out its immateriality. 99 F. Supp., at 97.

This box was filled by names selected by the clerk of the jury commissioners and corrected by the commissioners. The names put in were substantially those selected by the clerk, who chose them from those on the tax lists who had "the most property." The clerk testified no racial discrimination entered into his selection. Since the effect of this possible objection to the selection of jurors on an economic basis was not raised or developed at the trial, on appeal to the State Supreme Court, on the former certiorari to this Court, or in the petition or brief on the present certiorari to this Court, it is not open to consideration here.[24] Such an important

[24] Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered. *Ex parte Spencer*, 228 U. S. 652, 660; *In re Wood*, 140 U. S. 278, 285; *Crowe* v. *United States*, 175 F. 2d 799; *Price* v. *Johnston*, 334 U. S. 266, 289, and the dissent.

national asset as state autonomy in local law enforcement must not be eroded through indefinite charges of unconstitutional actions.

As we have stated above in discussing the *Brown* case, page 473, *et seq., supra,* our conclusion that selection of prospective jurors may be made from such tax lists as those required under North Carolina statutes without violation of the Federal Constitution, this point needs no further elaboration. The fact that causes further consideration in this case of the selection of prospective jurors is that the tax lists show 8,233 individual taxpayers in Vance County of whom 3,136 or 38% are Negroes. In the jury box involved, selected from that list, there were 2,126 names. Of that number 145 were Negroes, 7%. This disparity between the races would not be accepted by this Court solely on the evidence of the clerk of the commissioners that he selected names of citizens of "good moral character and qualified to serve as jurors, and who had paid their taxes." [25] It would not be assumed that in Vance County there is not a much larger percentage of Negroes with qualifications of jurymen.[26] The action of the commissioners' clerk, however, in selecting those with "the most property," an economic basis not attacked here, might well account for the few Negroes appearing in the box. Evidence of discrimination based solely on race in the selection actually made is lacking.

The trial and district courts, after hearing witnesses, found no racial discrimination in the selection of the prospective jurors. The conviction was upheld as non-

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[25] We understand his last basis of qualification was not required. See *Brown* v. *Allen, supra,* page 470, and General Statutes of North Carolina, § 9–1 as amended 1947.

[26] Moral character and intelligence sufficient to serve as jurors is the statutory test. N. C. Gen. Stat., 1943, § 9–1. Even in 1930 only 18.5% over 10 years of age were illiterate. 1930 Census, Vol. III, part 2, p. 359. See *Hill* v. *Texas,* 316 U. S. 400, 404.

discriminatory by the State Supreme Court, which had once acted to reverse a conviction of this defendant by a jury deemed tainted with racial discrimination, *State* v. *Speller,* 229 N. C. 67, 47 S. E. 2d 537, and again to reverse a conviction when adequate time for investigation of discrimination had not been given. *State* v. *Speller,* 230 N. C. 345, 53 S. E. 2d 294. It would require a conviction, by this Court, of violation of equal protection through racial discrimination to set aside this trial. Our delicate and serious responsibility of compelling state conformity to the Constitution by overturning state criminal convictions, should not be exercised without clear evidence of violation.

Disregarding, as we think we should, the clerk's unchallenged selections based on taxable property, there is no evidence of racial discrimination. Negroes' names now appear in the jury box. If the requirement of comparative wealth is eliminated, and the statutory standards employed, the number would increase to the equality justified by their moral and educational qualification for jury service as compared with the white race. We do not think the small number, by comparison, of Negro names in this one jury box, is, in itself, enough to establish racial discrimination.

Third. We have the problems presented by No. 20, *Daniels* v. *Allen.* The two petitioners, Negroes, were indicted and convicted in the North Carolina courts on a charge of murder. Their trial in the Superior Court of Pitt County resulted in a verdict of guilty, and each petitioner was thereafter sentenced to death. There is no issue over guilt under the evidence introduced. In addition to the objections stated above at p. 453—discrimination in jury lists, coerced confessions and refusal to hear on the merits—there is also objection here to the procedure for determination of the voluntariness of the con-

fessions. As the failure to serve the statement of the case on appeal seems to us decisive, we do not discuss in detail the other constitutional issues tendered and only point out that they were resolved against the petitioners by the sentencing state court and the Federal District Court after full hearing of the evidence offered. It is also to be noted that the Supreme Court of North Carolina refused certiorari to review the alleged invasions of constitutional rights by the sentencing court and two efforts of petitioners to secure an order permitting them to apply for *coram nobis*.[27] The writ of *coram nobis* is available in North Carolina to test constitutional rights extraneous of the record. *In re Taylor*, 230 N. C. 566, 53 S. E. 2d 857. In the first *coram nobis* case the Court said, speaking of its refusal of certiorari:

> "Counsel for petitioners were advised, however, that petition might be filed here for permission to apply to the Superior Court of Pitt County, where the cause was tried, for a writ of error *coram nobis*, through which, if allowed there, they might be heard on the main features on which they asked for relief, which included matters *dehors* the record, and that appeal would lie to the Supreme Court in the event of its unfavorable action. *S. v. Daniels, supra; In re Taylor* (230 N. C.), *supra; In re Taylor* (229 N. C.), supra.
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> "The defendants now file a petition for permission to apply to the Superior Court for such a writ. Their petition does not make a *prima facie* showing of substance which is necessary to bring themselves within the purview of the writ." [28] 231 N. C. 341, 56 S. E. 2d 646, 647.

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[27] *State* v. *Daniels*, 231 N. C. 17, 56 S. E. 2d 2; 231 N. C. 341, 56 S. E. 2d 646; 232 N. C. 196, 59 S. E. 2d 430.

[28] Compare *Taylor* v. *Alabama*, 335 U. S. 252.

After the refusal of the first *coram nobis* petition, the Supreme Court of North Carolina dismissed petitioners' attempted appeal on the record proper on the ground that no case on appeal had been filed. 231 N. C. 509, 57 S. E. 2d 653; Rule 17, 4 N. C. Gen. Stat., App.; *id.*, Vol. 1, § 1–282. Such action accords with well-settled practice in that state. "Rules requiring service to be made of case on appeal within the allotted time are mandatory." 231 N. C. 17, 24, 56 S. E. 2d 2, 7. They are applied alike to all appellants.[29] The first application for certiorari to this Court raised federal constitutional objections to the judgments of the Supreme Court of North Carolina on both direct and collateral attack by certiorari and *coram nobis* on the judgment of the trial court. 339 U. S. 954.

The failure to perfect the appeal came in this way. Upon the coming in of the verdict on June 6, 1949, the petitioners several times moved for a new trial, in each motion reiterating one or the other of the aforementioned federal questions. These motions were denied, and the trial court pronounced its sentence. Petitioners excepted to the judgments and noted appeals therefrom to the State Supreme Court. In response to petitioners' notice, the trial judge granted petitioners 60 days in which to make and serve a statement of the case on appeal. When counsel failed to serve this statement until 61 days had expired, the trial judge struck the appeal as out of

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[29] *State* v. *Watson*, 208 N. C. 70, 71, 179 S. E. 455, 456, is a capital case where the prisoner "failed to make out and serve statement of case on appeal within the statutory period." He lost his right to prosecute the appeal, and it was dismissed. The court pointed out, however, that it was customary in capital cases to examine the record to see that no error appeared on its face. In *State* v. *Morrow*, 220 N. C. 441, 17 S. E. 2d 507, the identical procedure was followed. In *State* v. *Moore*, 210 N. C. 686, 188 S. E. 421, and *State* v. *Lampkin*, 227 N. C. 620, 44 S. E. 2d 30, also capital cases, writs of certiorari were denied when the statement of the case on appeal had not been filed within the statutory period.

time. This action precluded an appeal as of right to the State Supreme Court.

This situation confronts us. North Carolina furnished a criminal court for the trial of those charged with crime. Petitioners at all times had counsel, chosen by themselves and recognized by North Carolina as competent to conduct the defense. In that court all petitioners' objections and proposals whether of jury discrimination, admission of confessions, instructions or otherwise were heard and decided against petitioners. The state furnished an adequate and easily-complied-with method of appeal. This included a means to serve the statement of the case on appeal in the absence of the prosecutor from his office. *State* v. *Daniels,* 231 N. C. 17, 24, 56 S. E. 2d 2, 7. Yet petitioners' appeal was not taken and the State of North Carolina, although the full trial record and statement on appeal were before it, refused to consider the appeal on its merits.[30]

The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U. S. C. § 2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal.[31] To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.

Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel,

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[30] *State* v. *Daniels,* 231 N. C. 17, 20 (11), 56 S. E. 2d 2, 4; Gen. Stat. of N. C., 1943, § 1–587.

[31] *Sunal* v. *Large,* 332 U. S. 174, 180; *Eagles* v. *Samuels,* 329 U. S. 304, 311; *In re Yamashita,* 327 U. S. 1, 8; *Johnson* v. *Zerbst,* 304 U. S. 458, 465; *Goto* v. *Lane,* 265 U. S. 393.

incapacity, or some interference by officials.[32] Also, this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible.[33] Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings.[34] Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.[35]

North Carolina has applied its law in refusing this out-of-time review.[36] This Court applies its jurisdictional statute in the same manner. *Preston* v. *Texas,* 343 U. S. 917, 933; cf. *Paonessa* v. *New York,* 344 U. S. 860, certiorari denied because "application therefor was not made within the time provided by law." We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution. A period of limitation accords with our conception of proper procedure.

Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254.

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[32] *Dowd* v. *Cook,* 340 U. S. 206; see *De Meerleer* v. *Michigan,* 329 U. S. 663; *Johnson* v. *Zerbst,* 304 U. S. 458.

[33] *Hawk* v. *Olson,* 326 U. S. 271, 278; *Herndon* v. *Lowry,* 301 U. S. 242, 247.

[34] *Smith* v. *Baldi,* decided today, *post,* p. 561, at pp. 569–570.

[35] *Darr* v. *Burford, supra,* at 203; *Ex parte Spencer,* 228 U. S. 652, 660. See *In re Wood,* 140 U. S. 278.

[36] See *McKane* v. *Durston,* 153 U. S. 684, 687, where this Court said: "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary."

443 Notations re JACKSON, J., and BURTON and CLARK, JJ.

See note 17, *supra.* See also note 2, *supra.* We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 447, *supra,* but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed.

We have spoken in this opinion of the change of practice in North Carolina in the selection of jurors. Our conclusions have been reached without regard to earlier incidents not connected with these juries or trials that suggest past discriminations. Since the states are the real guardians of peace and order within their boundaries, it is hoped that our consideration of these records will tend to clarify the requirements of the Federal Constitution in the selection of juries. Our Constitution requires that jurors be selected without inclusion or exclusion because of race. There must be neither limitation nor representation for color. By that practice, harmony has an opportunity to maintain essential discipline, without that objectionable domination which is so inconsistent with our constitutional democracy.

The judgments are affirmed.

MR. JUSTICE JACKSON concurs in this result for the reasons stated in a separate opinion. [See *post,* pp. 532, 548.]

MR. JUSTICE BURTON and MR. JUSTICE CLARK adhere to their position as stated in *Darr* v. *Burford,* 339 U. S. 200, at 219. They believe that the nature of the proceed-

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ing upon a petition for certiorari is such that, when the reasons for a denial of certiorari are not stated, the denial should be disregarded in passing upon a subsequent application for relief, except to note that this source of possible relief has been exhausted.

They join in the judgment of the Court in these cases and they concur in the opinion of the Court except insofar as it may contain, in Part II, Subdivision A (pp. 456–457), or elsewhere, any indication that, although the reasons for a denial of certiorari be not stated, those reasons nevertheless may be inferred from the record. They also recognize the propriety of the considerations to which MR. JUSTICE FRANKFURTER invites the attention of a federal court when confronted with a petition for a writ of habeas corpus under the circumstances stated.

MR. JUSTICE FRANKFURTER.*

The course of litigation in these cases and their relevant facts are set out in MR. JUSTICE REED'S opinion. This opinion is restricted to the two general questions which must be considered before the Court can pass on the specific situations presented by these cases. The two general problems are these:

I. The legal significance of a denial of certiorari, in a case required to be presented here under the doctrine of *Darr* v. *Burford,* 339 U. S. 200, when an application for a writ of habeas corpus thereafter comes before a district court.

II. The bearing that the proceedings in the State courts should have on the disposition of such an application in a district court.

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*[For notation of position of MR. JUSTICE BURTON and MR. JUSTICE CLARK on the same points, see *ante,* p. 487; for notation of position of MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS on the same points, see *post,* p. 513. In addition to the three cases decided in the Opinion of the Court, *ante,* p. 443, this opinion applies also to *United States ex rel. Smith* v. *Baldi, post,* p. 561.]

I.

Darr v. *Burford* sheds no light on the effect a district court is to give our denial of certiorari in one of these cases. That decision was expressly limited to ruling that "ordinarily" the certiorari jurisdiction of this Court must be invoked in an attempt to secure review of a State court's refusal of relief prior to an application for habeas corpus in a district court. *Darr* v. *Burford,* 339 U. S., at 201, 214. The fact that two members of the necessary majority in *Darr* v. *Burford* deemed it appropriate to disavow concurrence in any "indication" in the Court's opinion that any effect is to be given to the denial of certiorari emphasizes that no such ruling can be attributed to *Darr* v. *Burford.* It was the view of MR. JUSTICE BURTON and MR. JUSTICE CLARK "that the nature of the proceeding is such that, when the reasons for a denial of certiorari are not stated, the denial should be disregarded in passing upon a subsequent application for relief, except to note that this source of possible relief has been exhausted." *Darr* v. *Burford, supra,* at 219. Of course, when the reasons are given, the decision to deny will have the effect indicated by the reasons stated. But we know best how puzzling it often would be to state why the Court denied certiorari even when we are parties to the denial.

In the three cases now here from the Fourth Circuit, the Court of Appeals relied heavily on our denial of certiorari in ruling against applications for federal habeas corpus by State prisoners.[1] Its opinion in No.

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[1] In No. 20, *Daniels* v. *Allen,* after speaking of the denial of certiorari, the District Judge felt it difficult to believe "that any impartial person would conclude in the light of the procedural history of this case that it clearly appears that petitioners were denied the substance of a fair trial." He concluded the petitioners had had a fair trial, that the writ should be vacated "because not available to petitioners on the procedural history, and if so, the petitioners are not entitled

20 relies on, and the per curiam decision in Nos. 22 and 32 quotes, an earlier decision by that court based on an express assumption that if this Court had thought that the record showed a denial of constitutional rights, cer-

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to discharge" since they did not substantiate their charges. *Daniels* v. *Crawford*, 99 F. Supp. 208, 213, 216. The Court of Appeals stated that it was only necessary to consider the proposition that petitioners were not entitled to the writ in view of the procedural history of the case and affirmed, saying that petitioners could not by habeas corpus circumvent the results of their failure to comply with the State procedural rules. Their allegation of peculiar hardship in only one day's default in complying with State procedural rules was before the Supreme Court in their application for certiorari "and, proper respect for that court requires that we assume that, if it had thought that such enforcement of the rules of court amounted to a denial of a fair hearing to men condemned to death, it would have granted certiorari either to the Supreme Court [of the State] or the trial court and would have reviewed the case. The case falls squarely, we think, within what was said by the Supreme Court in *Ex parte Hawk*, 321 U. S. 114, 118, ..." *Daniels* v. *Allen*, 192 F. 2d 763, 768, 769.

In No. 22, *Speller* v. *Allen*, the District Court stated that it "felt strongly disposed to deny the petition for writ of habeas corpus solely on the procedural history" but decided to hear evidence on the merits. After hearing evidence, the Court dismissed, "upon the procedural history and the record in the State Courts, for the reason that habeas corpus proceeding is not available to the petitioner for the purpose of raising the identical question passed upon in those Courts." Further, even if entitled to raise the same question, petitioner did not substantiate his claims. *Speller* v. *Crawford*, 99 F. Supp. 92, 95, 97. The Court of Appeals cited *Ex parte Hawk* and quoted from its opinion in *Stonebreaker* v. *Smyth*, 163 F. 2d 498, 499, to the same effect as the language in No. 20, that "proper respect" compels the conclusion that the Supreme Court would have granted certiorari had it thought petitioner's constitutional rights violated. *Speller* v. *Allen*, 192 F. 2d 477, 478.

In No. 32, *Brown* v. *Allen*, the District Court relied on *Stonebreaker* v. *Smyth* and denied the writ, noting that petitioner had apparently had a fair and impartial trial in the State courts and that the Supreme Court had refused to review the State court action. *Brown* v. *Crawford*, 98 F. Supp. 866. The Court of Appeals considered the case together with No. 22, and, as stated above, affirmed.

tiorari would have been granted. *Stonebreaker* v. *Smyth,* 163 F. 2d 498, 499.

If we were to sanction a rule directing the District Courts to give any effect to a denial of certiorari, let alone the effect of *res judicata* which is the practical result of the position of the Fourth Circuit, we would be ignoring actualities recognized ever since certiorari jurisdiction was conferred upon this Court more than sixty years ago.

From its inception certiorari jurisdiction has been treated for what it is in view of the function that it was devised to serve. It was designed to permit this Court to keep within manageable proportions, having due regard to the conditions indispensable for the wise adjudication of those cases which must be decided here, the business that is allowed to come before us. By successive measures Congress enlarged the discretionary jurisdiction of the Court until, by the Judiciary Act of 1925, supplemented by the Court's own invention of the jurisdictional statement in relation to the narrow scope of residual appeals, the Court became complete master of its docket. The governing consideration was authority in the Court to decline to review decisions which, right or wrong, do not present questions of sufficient gravity. Whatever the source of these questions, whether the common law, statutes or the Constitution, other cases of obvious gravity are more than enough to absorb the Court's time and thought. Cf. *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258.

It is within the experience of every member of this Court that we do not have to, and frequently do not, reach the merits of a case to decide that it is not of sufficient importance to warrant review here. Thirty years ago the Court rather sharply reminded the Bar not to draw strength for lower court opinions from the fact that they were left unreviewed here. "The denial of a writ of

certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver,* 260 U. S. 482, 490. We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard. Any departure from this fundamental rule in the type of case we are considering ought to be based on a showing that these denials of certiorari, unlike all the other denials, are in fact the essential equivalents of adjudication on the merits. The results of the inquiry detailed in the Appendix, *post,* p. 514, show that the contrary is the fact.[2] There is certainly no more assurance that these petitions have been canvassed on their merits than is true of cases within the ordinary domain of certiorari jurisdiction.

Indeed, there is less assurance that petitions by State prisoners could be considered on their merits than is the case with ordinary petitions for certiorari. To treat denials of certiorari in cases in which applications for habeas corpus are subsequently made in effect as adjudications here, presupposes, at the least, that such "determinations"

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[2] An attempt to determine the factual context of a statistically representative group of habeas corpus applications is summarized in the Appendix, *post,* p. 514; the study there reported reflects the examination of the 126 Supreme Court files in cases in which certiorari was denied to State prisoners during the October 1950 Term and habeas corpus applications subsequently made in federal district courts, and examination of materials obtained in response to questionnaires sent to the District Clerks concerning the applications and the dispositions of those 126 cases in the District Courts.

are based on records of litigation in which issues are more or less carefully shaped by competent lawyers, as is after all true of the ordinary flow of certiorari cases. Such an assumption is shown to be wholly baseless by the study of the 126 certiorari files on which this opinion is based. It is also an assumption that falsifies the picture of the habeas corpus problems facing the District Judge.

These petitions for certiorari are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work.[3] The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field.[4] Indeed, the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking. Whether there has been an adjudication or simply a perfunctory denial of a claim below is rarely ascertainable. Seldom do we have enough on which to base a solid conclusion as to the adequacy of the State adjudication. Even if we are told something about a trial of the claims

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[3] See Appendix, *post*, p. 516. As shown there, only 13 of 126 petitions were drawn by lawyers; others, of course, may have been drawn by lawyers either in or out of prison who did not choose to sign the petition. But our experience affirms the conclusion set forth in the survey based on one test of the legal adequacy of the petitions, that in a large number of cases, the petitions must be combed through to find the issues, certainly much more so than is true of the ordinary petitions for certiorari.

[4] See Appendix, *post*, pp. 516–517 and Table 1, *post*, pp. 518–519. The fact that we rarely do have sufficient papers may account for our disputes, even in the cases we grant, as to what has happened below. See, *e. g.*, *Uveges* v. *Pennsylvania*, 335 U. S. 437. At the very least, we would want to have the petitions and the orders below, but even as to this minimum, as Table 1, Part 2 shows (Item "*a* and *c*"), in only 53 of the 114 cases in which the issues were raised after trial was this minimum available to us.

the applicant asserts, we almost never have a transcript of these proceedings to assist us in determining whether the trial was adequate.[5] Equally unsatisfactory as a means for evaluating the State proceedings is the filing of opinions; in less than one-fourth of the cases is more than a perfunctory order of the State courts filed.[6] We would have to have very different records and to alter our consideration of these cases radically if a denial could fairly be deemed to be an undisclosed decision on the merits. In a few cases the issues before the District Court had not even been raised here.[7] In other cases, the emphasis put on the issues here differed considerably from that put on them in the District Courts. Alice could understand, but not I, how under such circumstances a district judge could assume if he is so minded, that we "decided" the question now presented to him.

Just as there is no ground for holding that our denial is in effect *res judicata,* so equally is there no basis for leaving the District Judge free to decide whether we passed on the merits. For there is more to the story. The District Judge ordinarily knows painfully little of the painfully little we knew. It is a rare case indeed in which the District Court has any information concerning the certiorari proceeding. In over 90% of the cases studied, there were neither papers filed nor allegations made indicating in any way what issue the petition for certiorari presented.[8] In even fewer cases was there any indication that any papers from the State proceedings had been before this Court.[9] It may be said that the District Court

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[5] See Appendix, Table 1, Part 2, *post,* p. 519.

[6] See Appendix, Table 1, Part 1, *post,* p. 518.

[7] See Appendix, *post,* pp. 525–526.

[8] See Appendix, Table 2, *post,* p. 523.

[9] See Appendix, Column 3 of Table 1, *post,* p. 518.

can call for the papers that were here. It is seldom done.[10] Moreover, in view of the unlikelihood that such a record could reveal enough for a sound judgment, such a requirement would be futile. But otherwise the District Judge can know only in a negligible number of cases what little we had before us. To say that he is at liberty to decide whether we passed on the merits of a case invites what must, in almost all cases, be idle speculation. We would be inviting a busy federal district judge to rest on our denial and cloak his failure to exercise a judgment in formal compliance with a statement that he can give meaning to something that almost always must to him be meaningless.

It is inadmissible to act as though these cases proceeded through the courts in an orderly fashion, leaving behind neat records which can be traced effectively with promise of enlightenment, once traced. Although it seems difficult to conceive of many cases in which a district judge, presented with a full record of the proceedings here, could give any relevant effect to the denial of certiorari, the likelihood is negligible that such a case will also be one of the very few in which he has enough materials to know what was before us. To give him discretion to interpret the denial of certiorari as a "determination" can so rarely be rationally justified that it is either futile or mischievous to allow such denial to weigh in the District Court's disposition.

In *Darr* v. *Burford* it was decided, as a matter of proper administration, that due regard for the relations between State and federal authority makes it undesirable in the ordinary case to permit an application to a federal dis-

[10] In 2 cases of the 126 studied, an order was entered in this Court returning original papers to the petitioner. Altogether, among the 329 applications for review of State denials of relief to State prisoners in the 1950 Term, 3 such orders were entered.

trict court on a claim which has already been presented to the State court before we have had an opportunity to review the State court action here. To hold, however, that a denial of certiorari may be deemed to be approval of the decision of the State court would be something far beyond fashioning a rule for the administration of judicial business. If district judges were authorized to deny an application for habeas corpus merely because the issues may have been considered by this Court in denying a petition for certiorari, the duty, which has been entrusted to the Federal Courts since the enlargement of the scope of habeas corpus jurisdiction by the Act of 1867, to deal judicially with applications for writs of habeas corpus by State convicts would be left to the unbounded, because undefined, discretion of the District Judges throughout the land. Judges dealing with the writ of habeas corpus, as with temporary injunctions, must be left some discretion—room for assessing fact and balancing conflicting considerations of public interest—if law is not to be a Procrustes bed. But discretion must be judicial discretion. It must be subject to rational criteria, by which particular situations may be adjudged. To allow applications for habeas corpus to be denied merely because it is deemed, on no reasonable or, at best, on the most fragile foundations, that the matter has already been adjudicated here, is to afford no criterion, but merely a shelter for district judges to respond according to the individual will.

We must not invite the exercise of judicial impressionism. Discretion there may be, but "methodized by analogy, disciplined by system." Cardozo, The Nature of the Judicial Process, 139, 141 (1921). Discretion without a criterion for its exercise is authorization of arbitrariness. The Nation's Supreme Court ought to be able to do better than to tell the Federal Judges of the land, in a field so vital as that of habeas corpus to vindicate con-

stitutional rights, that they may do as they please—that they are not to be bound, nor to be guided, by considerations capable of rational formulation.

This is not to impugn the conscientiousness of federal judges; if left at large in disposing of applications for a writ of habeas corpus, they would necessarily be thrown back upon their individual judgments, and that would be the exercise not of law but of arbitrariness.

The reasons why our denial of certiorari in the ordinary run of cases can be any number of things other than a decision on the merits are only multiplied by the circumstances of this class of petitions. And so we conclude that in habeas corpus cases, as in others, denial of certiorari cannot be interpreted as an "expression of opinion on the merits." *Sunal* v. *Large,* 332 U. S. 174, 181.

II.

The issue of the significance of the denial of certiorari raises a sharp division in the Court. This is not so as to the bearing of the proceedings in the State courts upon the disposition of the application for a writ of habeas corpus in the Federal District Courts. This opinion is designed to make explicit and detailed matters that are also the concern of MR. JUSTICE REED'S opinion. The uncommon circumstances in which a district court should entertain an application ought to be defined with greater particularity, as should be the criteria for determining when a hearing is proper. The views of the Court on these questions may thus be drawn from the two opinions jointly.

I deem it appropriate to begin by making explicit some basic considerations underlying the federal habeas corpus jurisdiction. Experience may be summoned to support the belief that most claims in these attempts to obtain review of State convictions are without merit. Presumably they are adequately dealt with in the State courts.

Again, no one can feel more strongly than I do that a casual, unrestricted opening of the doors of the federal courts to these claims not only would cast an undue burden upon those courts, but would also disregard our duty to support and not weaken the sturdy enforcement of their criminal laws by the States. That wholesale opening of State prison doors by federal courts is, however, not at all the real issue before us is best indicated by a survey recently prepared in the Administrative Office of the United States Courts for the Conference of Chief Justices: of all federal question applications for habeas corpus, some not even relating to State convictions, only 67 out of 3,702 applications were granted in the last seven years. And "only a small number" of these 67 applications resulted in release from prison: "a more detailed study over the last four years . . . shows that out of 29 petitions granted, there were only 5 petitioners who were released from state penitentiaries." [11] The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.

For surely it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy. Under the guise of fashioning a procedural rule, we are

[11] Habeas Corpus Cases in the Federal Courts Brought by State Prisoners, Administrative Office of the United States Courts 4 (Dec. 16, 1952). See also Appendix, *post*, pp. 526–527 and especially 526, n. 19, discussing the reluctance of the District Court to grant the one application out of the 126 there surveyed which was granted.

not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction.

Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution. See The Federalist, No. 82; *Claflin* v. *Houseman,* 93 U. S. 130; *Testa* v. *Katt,* 330 U. S. 386; Note, 60 Harv. L. Rev. 966. Indeed, the jurisdiction given to the federal courts to issue writs of habeas corpus by the First Judiciary Act, § 14, 1 Stat. 81–82, extended only to prisoners in custody under authority of the United States. It was not until the Act of 1867 that the power to issue the writ was extended to an applicant under sentence of a State court. It is not for us to determine whether this power should have been vested in the federal courts. As Mr. Justice Bradley, with his usual acuteness, commented not long after the passage of that Act, "although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus,* there seems to be no escape from the law." *Ex parte Bridges,* 2 Woods (5th Cir.) 428, 432. His feeling has been recently echoed in a proposal of the Judicial Conference of Senior Circuit Judges that these cases be heard by three-judge courts.[12] See

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[12] The proposal has now been abandoned. See Rep. Jud. Conf., 1947, p. 17. A suggestion of Mr. Justice Bradley on the subject, *Ex parte Bridges, loc. cit. supra,* is reflected in the proposal of the Conference of the Chief Justices of the States that the final judgment of a State's highest court in a criminal proceeding "be subject to review or reversal only by the Supreme Court of the United States." 25 State Government 249–250 (November 1952).

Rep. Jud. Conf. 1943, p. 23. But the wisdom of such a modification in the law is for Congress to consider, particularly in view of the effect of the expanding concept of due process upon enforcement by the States of their criminal laws. It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims. See, *e. g., Mooney* v. *Holohan,* 294 U. S. 103; *Johnson* v. *Zerbst,* 304 U. S. 458.

In exercising the power thus bestowed, the District Judge must take due account of the proceedings that are challenged by the application for a writ. All that has gone before is not to be ignored as irrelevant. But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. Cf. *Ex parte Royall,* 117 U. S. 241, 248–250. A State determination may help to define the claim urged in the application for the writ and may bear on the seriousness of the claim. That most claims are frivolous has an important bearing upon the procedure to be followed by a district judge. The prior State determination may guide his discretion in deciding upon the appropriate course to be followed in disposing of the application before him. The State record may serve to indicate the necessity of further pleadings or of a quick hearing to clear up an ambiguity, or the State record may show the claim to be frivolous or not within the competence of a federal court because solely dependent on State law.

It may be a matter of phrasing whether we say that the District Judge summarily denies an application for a writ by accepting the ruling of the State court or by making an independent judgment, though he does so on

the basis of what the State record reveals. But since phrasing mirrors thought, it is important that the phrasing not obscure the true issue before a federal court. Our problem arises because Congress has told the District Judge to act on those occasions, however rare, when there are meritorious causes in which habeas corpus is the ultimate and only relief and designed to be such. Vague, undefined directions permitting the District Court to give "consideration" to a prior State determination fall short of appropriate guidance for bringing to the surface the meritorious case. They may serve indiscriminately to preclude a hearing where one should have been granted, and yet this basis for denial may be so woven into the texture of the result that an improper deference to a State court treatment of a constitutional issue cannot even be corrected on review. If we are to give effect to the statute and at the same time avoid improper intrusion into the State criminal process by federal judges—and there is no basis for thinking there is such intrusion unless "men think dramatically, not quantitatively," Holmes, Collected Legal Papers, p. 293—we must direct them to probe the federal question while drawing on available records of prior proceedings to guide them in doing so.

Of course, experience cautions that the very nature and function of the writ of habeas corpus precludes the formulation of fool-proof standards which the 225 District Judges can automatically apply. Here as elsewhere in matters of judicial administration we must attribute to them the good sense and sturdiness appropriate for men who wield the power of a federal judge. Certainly we will not get these qualities if we fashion rules assuming the contrary. But it is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions

that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts.

First. Just as in all other litigation, a prima facie case must be made out by the petitioner. The application should be dismissed when it fails to state a federal question, or fails to set forth facts which, if accepted at face value, would entitle the applicant to relief.

Care will naturally be taken that the frequent lack of technical competence of prisoners should not strangle consideration of a valid constitutional claim that is bunglingly presented. District judges have resorted to various procedures to that end. Thus, a lawyer may be appointed, in the exercise of the inherent authority of the District Court (cf., *e. g., Ex parte Peterson,* 253 U. S. 300), either as an *amicus* or as counsel for the petitioner, to examine the claim and to report, or the judge may dismiss the petition without prejudice.[13]

Second. Failure to exhaust an available State remedy is an obvious ground for denying the application. An attempt must have been made in the State court to present the claim now asserted in the District Court, in compliance with § 2254 of the Judicial Code. Section 2254 does not, however, require repeated attempts to invoke the same remedy nor more than one attempt where there are alternative remedies. Further, *Darr* v. *Burford* requires "ordinarily" an application for certiorari to the United States Supreme Court from the State's denial of relief. Cf. *Frisbie* v. *Collins,* 342 U. S. 519, 520–522.

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[13] The Appendix shows a wide variety of procedures used to accommodate judicial proceedings to the needs of petitioners ill-equipped to state whatever claims they may have. See Appendix, Table 4, *post,* p. 528, and *post,* p. 527. By any standard, the applications for habeas corpus are very often woefully inadequate to apprise the judge of the claim. See Appendix, *post,* pp. 522–523.

Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a State's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal Constitution may be waived at the trial, *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank* v. *Mangum,* 237 U. S. 309, 343. When a State insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal. See *Adams* v. *United States ex rel. McCann, supra,* at 274. Compare *Sunal* v. *Large,* 332 U. S. 174, with *Johnson* v. *Zerbst,* 304 U. S. 458, 465–469. However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in *Moore* v. *Dempsey,* 261 U. S. 86. Cf. *Ex parte Lange,* 18 Wall. 163; *Ex parte Royall,* 117 U. S. 241.

Third. If the record of the State proceedings is not filed, the judge is required to decide, with due regard to efficiency in judicial administration, whether it is more desirable to call for the record or to hold a hearing. Ordinarily, where the issues are complex, it will be simpler to call for the record, certainly in the first instance. If the issues are simple, or if the record is called for and is found inadequate to show how the State court decided the relevant historical facts, the District Court shall use appropriate procedures, including a hearing if necessary, to decide the issues.

Such flexibility in the inquiry into the facts is necessary. A printed record reflecting orderly procedure through the State courts and showing clearly what has

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happened in the State courts is rarely available in these cases.[14] The effort and expense of calling for a record and of having a transcript of the proceedings prepared might be more burdensome than a short hearing, especially where the questions of fact are simple and easily settled. It seems an unnecessary deference to State proceedings to say that the District Judge, regardless of the relative expense of one procedure or the other, must always call for everything in the State proceedings. To satisfy requirements of exhaustion he will want to know enough to know whether the claim presented to him was presented in the State courts. But if the claim is either frivolous or, at the other extreme, substantial and if the facts are undisputed, to call for the State record would probably avail little. If the claim is frivolous, the judge should deny the application without more. If the question is one on which he must exercise his legal judgment under the habeas corpus statute,[15] it may be sufficient to have information, perhaps presented by the pleadings of the applicant or of the State, as to the disposition of any disputed questions of fact. It seems unduly rigid to require the District Judge to call for the State record in every case.

Moreover, the kinds of State adjudications differ. In some cases the State court has held a hearing and rendered a decision based on specific findings of fact; there may have been review by a higher State court which had before it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases. At the other pole is the perfunctory memorandum order denying a badly drawn petition and stating simply that the petitioner is not en-

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[14] See Appendix, Table 1, *post*, pp. 518–519.

[15] See pp. 500–501, *supra*, and pp. 507–508, *post*.

titled to relief. The District Judge cannot give the same weight to this sort of adjudication as he does to the first; he has no basis for exercising the judgment the statute requires him to exercise.

These criteria for determining when it is proper to hold a hearing seem to me appropriate in relating the habeas corpus provisions to the realities of these cases. Section 2241 empowers the District Courts to grant writs of habeas corpus to prisoners in custody in violation of the Federal Constitution. Section 2243 commands the judge "entertaining" an application to award the writ or issue an order to show cause "unless it appears from the application that the applicant . . . is not entitled thereto." It seems clear enough that the word "entertain" does not refer to holding a hearing, and MR. JUSTICE REED'S suggestion that it refers to the District Court's conclusion that a hearing is "proper," [16] is unsatisfying.[17] The proviso that no writ or order need be issued if the application shows that the applicant is not entitled thereto certainly permits "entertaining" and nevertheless summarily dismissing for failure to state a claim, failure to exhaust State remedies, or proof from the papers themselves, including the record of the State proceedings, if filed, that there is no claim. At the same time, the command that the writ or an order be issued in some cases hardly requires a hearing in every such case. As in any litigation, the pleadings may show, either separately or taken together, that there is no claim. It can hardly be contended that by "entertaining" the application to the extent of issuing the writ or an order, the

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[16] Opinion of MR. JUSTICE REED, *supra*, p. 461.

[17] MR. JUSTICE REED'S citation of *Walker* v. *Johnston*, 312 U. S. 275, to indicate what might be a "proper" case in which to hold a hearing is puzzling, for that case requires, in habeas corpus actions by federal prisoners, that a hearing be held if the application and the answer or return to the writ raise a question of fact.

District Judge commits himself to holding a hearing, if the return to the writ or the order to show cause shows unquestionably that the applicant is not entitled to discharge.[18]

Fourth. When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.[19]

A State determination of the historical facts, the external events that occurred, may have been made after hearing witnesses perhaps no longer available or whose recollection later may have been affected by the passage of time or by the fact that one judicial determination has already been made. To be sure, these considerations argue equally against hearing the claims at all long after the facts took place. But Congress, by making habeas corpus available, has determined that other considerations prevail. We are left to devise appropriate rules, and the congressional determination does not preclude rules recognizing the soundness of giving great weight to testimony earlier heard, just as it does not undermine the principle

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[18] The language of § 2243, "When the writ or order is returned a day shall be set for hearing . . .," hardly requires a hearing in every case in which a writ is issued. Just as the District Judge may deny an application without a hearing if the return shows that applicant failed to exhaust the State remedy—as he certainly may do—so may he dispose of the case without a hearing if the return conclusively shows applicant's failure to state a claim.

[19] See pp. 507–508, *post.*

that the burden of proving facts inconsistent with judicial records in all proceedings of this kind is heavy.

Fifth. Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, see *Baumgartner* v. *United States,* 322 U. S. 665, 670–671, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

For instance, the question whether established primary facts underlying a confession prove that the confession was coerced or voluntary cannot rest on the State decision. See, *e. g., Haley* v. *Ohio,* 332 U. S. 596, 601 (concurring opinion) and *Stroble* v. *California,* 343 U. S. 181, 190. Again, *Powell* v. *Alabama,* 287 U. S. 45, represents the settled rule that due process requires a State court in capital cases to assign counsel to the accused. Consequently, a finding in a State court of the historical fact that the accused had not had counsel could be considered binding by the District Judge, who would issue the writ regardless of what conclusion the State court had reached as to the law on representation by counsel in capital cases. If the conviction was not for a capital offense, however, *Powell* v. *Alabama* may not apply, and the considerations adverted to in that opinion as to the necessity of counsel in a particular case to ensure fundamental fairness would be controlling. The District Judge would then look to the State proceedings for whatever light they shed on the historical facts such as the age and intelligence of the accused, his familiarity with legal proceedings, and the kind of issues against which he had to defend himself. Cf. *Johnson* v. *Zerbst,* 304 U. S. 458. But it is for the federal judge to assess on the basis of such historical facts the fundamental fairness

of a conviction without counsel in the circumstances. Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Sixth. A federal district judge may under § 2244 take into consideration a prior denial of relief by a federal court, and in that sense § 2244 is of course applicable to State prisoners. Section 2244 merely gave statutory form to the practice established by *Salinger* v. *Loisel,* 265 U. S. 224. What was there decided and what § 2244 now authorizes is that a federal judge, although he may, need not inquire anew into a prior denial of a habeas corpus application in a federal court if "the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

These standards, addressed as they are to the practical situation facing the District Judge, recognize the discretion of judges to give weight to whatever may be relevant in the State proceedings, and yet preserve the full implication of the requirement of Congress that the District Judge decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts. Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims,

by way of habeas corpus. Such power is in the spirit of our inherited law. It accords with, and is thoroughly regardful of, "the liberty of the subject," from which flows the right in England to go from judge to judge, any one of whose decisions to discharge the prisoner is final.[20] Our rule is not so extreme as in England; § 2244 does place some limits on repeating applications to the Federal Courts. But it would be in disregard of what Congress

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[20] See *Secretary of State for Home Affairs* v. *O'Brien,* [1923] A. C. 603, 610, where the House of Lords ruled that despite the fact that "in terms the words [of § 3 of the Appellate Jurisdiction Act of 1876, 39 & 40 Vict. 380] are wide enough to give an appeal in such a matter as the present," the House of Lords has no jurisdiction to hear an appeal in a habeas corpus case that went in favor of "the liberty of the subject." It is worth noting that by this decision the House of Lords applied and extended an earlier decision of the House of Lords (*Cox* v. *Hakes,* 15 A. C. 506 (1890)) in which so powerful a group of judges as Lord Halsbury L. C. and Lords Watson, Bramwell, Herschell and Macnaghten joined. The tenor of that decision is sufficiently indicated by the quotations that follow. Lord Halsbury wrote:

"In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such a determination that, if favourable to liberty it was without appeal, and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted, have from time to time been pointed out by Judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a suit but was a summary application by the person detained." 15 A. C., at 514–515.

And this is from the judgment of Lord Herschell:

"No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained

has expressly required to deny State prisoners access to the federal courts.

The reliable figures of the Administrative Office of the United States Courts, *supra*, p. 498, showing that during the last four years five State prisoners, all told, were discharged by federal district courts, prove beyond peradventure that it is a baseless fear, a bogeyman, to worry lest State convictions be upset by allowing district courts to entertain applications for habeas corpus on behalf of prisoners under State sentence. Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.

I yield to no member of this Court in awareness of the enormity of the difficulties of dealing with crime that is the concomitant of our industrialized society. And I am deeply mindful of the fact that the responsibility for this task largely rests with the States. I would not for a

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in custody might thus proceed from court to court until he obtained his liberty. . . . I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of habeas corpus was of opinion that the custody was unlawful." *Id.*, at 527–528.

moment hamper them in the effective discharge of this responsibility. Equally am I aware that misuse of legal procedures, whereby the administration of criminal justice is too often rendered leaden-footed, is one of the disturbing features about American criminal justice. On the other hand, it must not be lost sight of that there are also abuses by the law-enforcing agencies. It does not lessen the mischief that it is due more often to lack of professional competence and want of an austere employment of the awful processes of criminal justice than to wilful misconduct. In this connection it is relevant to quote the observations of one of the most esteemed of Attorneys General of the United States, William D. Mitchell:

> "Detection and punishment of crime must be effected by strictly lawful methods. Nothing has a greater tendency to beget lawlessness than lawless methods of law enforcement. The greater the difficulties of detecting and punishing crime, the greater the temptation to place a strained construction on statutes to supply what may be thought to be more efficient means of enforcing law. The statutory and constitutional rights of all persons must be regarded, and their violation, inadvertent or otherwise, is to be avoided." (Department of Justice release, for April 8, 1929.)

Unfortunately, instances are not wanting in which even the highest State courts have failed to recognize violations of these precepts that offend the limitations which the Constitution of the United States places upon enforcement by the States of their criminal law. See, *e. g.*, *De Meerleer* v. *Michigan,* 329 U. S. 663, and *Marino* v. *Ragen,* 332 U. S. 561. Can it really be denied that in both these cases, which antedated *Darr* v. *Burford,* the

United States District Courts sitting in Illinois and Michigan would have been justified in granting the writ of habeas corpus had application been made for it? The tag that an inferior court should not override a superior court would not have been a fit objection against the exercise of the jurisdiction with which the Congress invested the District Courts.

The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. "The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom." Mr. Chief Justice Chase, writing for the Court, in *Ex parte Yerger,* 8 Wall. 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.

The significance of the writ for the moral health of our kind of society has been amply attested by all the great commentators, historians and jurists, on our institutions. It has appropriately been characterized by Hallam as "the principal bulwark of English liberty." But the writ has potentialities for evil as well as for good. Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization.

The circumstances and conditions for bringing into action a legal remedy having such potentialities obviously

cannot be defined with a particularity appropriate to legal remedies of much more limited scope. To attempt rigid rules would either give spuriously concrete form to wide-ranging purposes or betray the purposes by strangulating rigidities. Equally unmindful, however, of the purposes of the writ—its history and its functions—would it be to advise the Federal District Courts as to their duty in regard to habeas corpus in terms so ambiguous as in effect to leave their individual judgment unguided. This would leave them free to misuse the writ by being either too lax or too rigid in its employment. The fact that we cannot formulate rules that are absolute or of a definiteness almost mechanically applicable does not discharge us from the duty of trying to be as accurate and specific as the nature of the subject permits.

It is inadmissible to deny the use of the writ merely because a State court has passed on a federal constitutional issue. The discretion of the lower courts must be canalized within banks of standards governing all federal judges alike, so as to mean essentially the same thing to all and to leave only the margin of freedom of movement inevitably entailed by the nature of habeas corpus and the indefinable variety of circumstances which bring it into play.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS.

We agree with MR. JUSTICE FRANKFURTER that our previous denial of certiorari in a case should be given no legal significance when an application for a writ of habeas corpus in that case comes before a Federal District Court. We also agree in substance with the views expressed in Part II of his opinion concerning the bearing of the proceedings in the State courts upon the disposition of an application for a writ of habeas corpus in the Federal District Court.

APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.

With a view to formulating wise procedures for the exercise of federal habeas corpus jurisdiction on applications by State prisoners, a study was made of all federal district court applications for habeas corpus by prisoners serving sentences in State prisons whose prior applications for certiorari to the United States Supreme Court from State court proceedings had been denied during the October 1950 Term.[1] That Term, the first following the decision in *Darr* v. *Burford,* was chosen because of the greater likelihood that habeas corpus actions initiated in the District Courts following a denial of certiorari in that Term would be terminated than would be true of cases in which certiorari had been denied last Term. The petitions for certiorari in the October 1950 Term and the number of subsequent applications for habeas corpus can fairly be said to be typical.

A list of all such petitions for certiorari was compared with lists of all habeas corpus applications in the Federal District Courts from October, 1950, until May, 1952.[2] As a result, 126 different petitioners [3] whose petitions for

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[1] Included were cases filed earlier but continued into the October 1950 Term; cases filed in the October 1950 Term but continued into later terms were excluded.

[2] In all this work we have had the ready cooperation of the Administrative Office of the United States Courts, more particularly of Will Shafroth, Esq., Orin S. Thiel, Esq., and Joseph F. Spaniol, Jr., Esq., and of the Clerks of the United States District Courts. Nor should the important share that Donald T. Trautman, Esq., had in carrying out this study go unmentioned.

[3] Excluding eight petitioners who were codefendants with other petitioners and who presented the same issues as those other petitioners. In all, 134 petitioners appeared again in the District Courts, but in only 126 separate cases. The words "case" and "petitioner" will both be used in reference to the 126 cases; when "petitioner" or "applicant" is used, it should be read as one or more prisoners presenting the same claim arising out of the same trial. For clarity, the

certiorari or other comparable relief [4] from State decisions were denied here were found to have brought subsequent proceedings [5] in the Federal District Courts. Thereupon, a questionnaire was sent out concerning each habeas corpus application, and the answers to those questionnaires, together with a study of Supreme Court files, form the basis for the survey.

The data are here set out in chronological sequence and not arranged with relation to the issues they affect. The information concerning the Supreme Court proceedings is set out first, in Part I, and in Part II that concerning the actions in the District Courts.

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prisoners will be referred to as "petitioners" for certiorari in the Supreme Court and "applicants" for habeas corpus in the District Courts.

[4] Cases in which petitioners in the Supreme Court sought original habeas corpus or mandamus or other relief have been included in this study, unless federal district court relief had already been invoked so that the habeas corpus application could not be interpreted as reviewing a State court determination. Petitions for certiorari or applications for other relief in the Supreme Court were not included if dismissed on motion of the petitioners.

[5] In cases where two or more petitions for certiorari were made by a single petitioner during the October 1950 Term, that case was analyzed which presented the issue or the course of proceedings later presented in the District Court. Where several applications for habeas corpus have been made in the District Courts, that application nearest in time to the denial of certiorari was used, unless (a) the first application was rejected for formal defects, such as failure to allege exhaustion of State remedies or failure to set out clearly the course of the proceedings, and the second application corrected those defects; or (b) the second (or a later) application, unlike the first, presented the issue or the course of proceedings which the Supreme Court was asked to review. In a few instances, the proceedings are so tangled that it was impossible to apply these criteria; thus, although ordinarily a case was excluded if State relief was sought after the denial of certiorari but before the application in the Federal District Court for habeas corpus, occasionally such a case was included if the issue or course of proceedings was the same in the District Court as in the Supreme Court.

I. PAPERS AND DISPOSITION IN SUPREME COURT.[6]

A. *The Petitions for Certiorari.*[7]

In 97 of the 126 cases only the original of the petition was filed; in the other 29 cases, at least one copy of the petition was filed, but in only two cases were there the minimum nine copies required of the ordinary petitions for certiorari. One-half of the petitions contained nine pages or less.

Of the 126 petitions, 13 were signed by lawyers. In a classification of the other petitions according to the degree of familiarity with law shown by the petitioners, 53 petitions were found not even to meet a generous standard requiring only that the petitioner intelligibly allege some facts and make some minimum attempt to connect those facts to a legal principle, whether or not the principle was valid or even arguable.

B. *Papers Filed in Support of the Petition for Certiorari.*

Four of the petitioners whose papers are still on file here[8] submitted over 300 pages of papers in support of the petition for certiorari. The other 120 petitioners filed an average of under 30 pages of supporting papers per case.

Full records, though in two cases not in due form, were filed by the petitioners in eight cases, while excerpts from the records both of the trial proceedings and of the State proceedings in which petitioner assailed the valid-

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[6] Every file in the 126 cases surveyed was studied; the data in the following sections are those revealed by the files. It occasionally occurred that particular data were unavailable. For that reason, wherever tables are presented, the total number of cases for which the data were available is indicated at the top of the table.

[7] See footnote 3 above.

[8] In two cases, at least some of the Supreme Court papers were returned to the petitioner.

ity of the trial proceedings were filed in another 51 cases, as is shown in Table 1. No papers from the record below were filed in 24 of 125 cases. Among the excerpts from the records filed, in 26 cases a State court opinion [9] was filed from some proceeding in which the same issues were presented. There was no citation to, or filing of, an opinion or memorandum order in 46 of the cases. The first column of Table 1 [10] shows in detail what papers from the records below were filed in the Supreme Court.

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[9] As there is no bright line between orders and opinions, any order containing more than a perfunctory statement in general terms that the relief sought was denied is classified as an opinion.

[10] The table does not purport to show all the papers filed in the Supreme Court, but only those filed by the petitioner, because such figures give a better index of the lack of technical competence of the petitioners and their inability, often, because of prison confinement, to prepare all the papers. At p. 521, *post*, the insubstantial change effected in these figures by the responses filed by the State is discussed.

The terms "trial proceedings" or "trial" are used to denote both the trial in which petitioner was convicted and direct appeal from the conviction. The terms "attacking proceedings" or "attack" include all actions such as habeas corpus, coram nobis, and other post-conviction remedies in the State courts to obtain relief from an invalid conviction. Delayed motions for new trial have been treated for purposes of these tables as attacking proceedings.

"Orders or Opinions" in Part 2 of the table includes, as to the trial proceedings, the judgment of conviction, the sentence or other conviction papers, as well as, for example, an order or opinion on direct appeal. As to trial and attacking proceedings, even the perfunctory order discussed in footnote 9 was included.

"Transcript of proceedings" or "Transcript" is used to denote a stenographic report of the testimony or hearings. Adequate excerpts from such transcripts are included.

"Motions or Petitions" is used to denote any pleadings by either party.

In 11 cases, there were no attacking proceedings. Hence the total number of Supreme Court cases in Part 2 of Table 1 is 114 rather than 125.

TABLE 1. PAPERS FILED IN SUPREME COURT AND COMPARISON WITH PAPERS FILED IN DISTRICT COURT *

Part 1

	NUMBER OF CASES IN SUPREME COURT			NUMBER OF CASES IN DISTRICT COURT *			DATA ALLEGED TO BE IN SUPREME COURT *		
I. *Filing of Record Below.*									
Total Cases for which data available		125	100.0%		123	100.0%		122	100%
No part of Record Below filed		24	19.2		35	28.5		115	94.3
Record Below or Excerpts filed		101	80.8		88	71.5		7	5.7
Full Record	8			6			0		
Excerpts from both trial and attack *	46			42			3		
Excerpts from trial where no attack	5	59		3	51		0	3	
Excerpts from attack only		36			20			4	
Excerpts from trial only		6			17			0	
II. *Filing of Opinion or Order Below.*									
Total Cases for which data available		126			122			122	
Opinion Below filed	26			16			3		
Opinion Below cited	3			4			0		
Excerpts from Opinion Below filed	1	30		1	21		0	3	
Order Below, filed or quoted		50			26			2	
Mere reference or less to Order Below		46			75			3	
Nothing alleged to show District Court what was before the Supreme Court		—			—			114	

*See footnote 10, *supra*, for explanation of the terms used in the table. The statistics in the second and third columns are discussed at p. 522 *et seq.*, *post*.

TABLE 1. PAPERS FILED IN DISTRICT COURT AND COMPARISON WITH PAPERS FILED IN SUPREME COURT—continued

Part 2

	NUMBER OF CASES IN SUPREME COURT		NUMBER OF CASES IN DISTRICT COURT		DATA ALLEGED TO BE IN SUPREME COURT	
	TRIAL*	ATTACK*	TRIAL	ATTACK	TRIAL	ATTACK
III. *Pleadings, Orders, and Transcripts.*						
Total Cases for which data available	125	114	123	112	122	111
a. Orders or Opinions *	52	71	47	37	2	4
b. Transcript of Proceedings *	18	4	14	3	1	1
c. Motions or Petitions *	12	67	5	34	0	3
IV. *Pleadings, Orders, and Transcripts by Cases.*						
Total Cases for which data available	125	114	123	112	122	111
a, b and *c* above	7	3	4	2	0	0
a only	40	14	39	18	2	2
b only	7	0	7	1	1	1
c only	2	11	0	15	0	1
a and *b*	3	1	3	0	0	0
a and *c*	2	53	1	17	0	2
b and *c*	1	0	0	0	0	0
Total, Some of Above Papers Filed	62 (49.6%)	82 (72.0%)	54 (43.9%)	53 (47.3%)	3 (2.5%)	6 (5.4%)

* See footnote 10, *supra*, for explanation of the terms used in the table.

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C. *Issues Presented.*

The issues raised by the petitioners varied from substantial federal claims to questions purely of State law. In a sorting of the petitions according to the claim that seemed the principal or most substantial one, two or three claims were found to have been most often asserted as the principal claim: the inadequacy of counsel or representation by counsel not of petitioner's choosing was claimed as the principal issue in 14 cases; in another 14, the sentences imposed were attacked as illegal, excessive or discriminatory; in 10 cases, a claim was made that the prosecuting attorney knowingly used perjured evidence or suppressed evidence. In general, errors in the preliminary proceedings were asserted as the main claim in 8 cases, errors in the indictment or information in 7, errors affecting the pleas in 14, concerning representation by counsel in 31, affecting the trial including inadmissibility of evidence, prejudice, and delay in 41, and errors surrounding the sentence in 17. Miscellaneous claims such as denials of a right to appeal or to a post-trial hearing and defects in extradition proceedings totaled 8.

Perhaps of most significance to the central problem here was the discrepancy between the claims made in the Supreme Court and those made in the District Courts. This comparison will be made in Part II, dealing with the issues presented in the District Courts.[11]

D. *Responses Filed by the States, and Final Disposition in the Supreme Court.*

Table 1, *supra,* shows what papers were filed by the petitioners and not necessarily all the papers before the Court. In 15 of the 126 cases, the Supreme Court, either because of the seriousness of the allegations or the inadequacy of the record as presented by the petitioner, called for a response by the State. Fourteen responses were filed in accordance with these requests. In addition,

[11] See pp. 525–526, *post.*

the docket of the Supreme Court shows that responses were filed by the State in another 7 cases. In 10 of the 21 responses in these cases, additional parts of the record not already filed by the petitioners thus came before the Court, but the additions do not substantially change the picture presented in Table 1. For example, Table 1, Part 1, shows that in 30 cases, the petitioner filed in the Supreme Court the opinion below or excerpts or cited the opinion; the States filed the opinion below with their responses in an additional 4 cases. Like modifications, in no instance exceeding 5 cases, would be made in other of the items in Table 1 if it included papers filed by the State.

The disposition of these cases in the Supreme Court is in marked contrast with the disposition of ordinary petitions for certiorari. Petitions for certiorari by State prisoners from State denials of relief and miscellaneous applications to this Court are almost always filed *in forma pauperis* and constitute about 60% of all petitions *in forma pauperis*. Since, as this study indicates, they are only rarely filed by lawyers and seldom accompanied by adequate records, the decision whether to entertain these cases is necessarily made upon less information and with greater dispatch than with ordinary petitions for certiorari. A rough index to the disposition of these cases as compared with ordinary petitions for certiorari is afforded by published figures showing the proportion of petitions granted. While 15.2% of the ordinary petitions for certiorari are granted, only 4.2% of the *in forma* petitions and no miscellaneous applications were granted during the 1950 Term.[12]

On an assumption that the certiorari jurisdiction of the Supreme Court ordinarily is not to be exercised merely

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[12] See Report of the Judicial Conference of the United States 1951—Annual Report of the Director of the Administrative Office of the United States Courts 1951, 78.

because a decision below may be wrong, an attempt was made to indicate in terms of considerations affecting the certiorari jurisdiction the sort of question presented.[13] Questions purely of State law seemed to be the chief claim of 30 petitions. Questions probably not of sufficient general importance to warrant the exercise of the certiorari jurisdiction seemed the chief claims in another 61 cases, 44 because the issue was one primarily of fact and 17 because the issue raised no substantial issue not already decided by the Supreme Court. Eighteen cases defied classification on this basis. The remaining 17 cases presented questions of principle, although the majority even of these probably did not present questions of the gravity or general importance usually requisite in other areas for granting certiorari.

II. PAPERS AND DISPOSITION IN DISTRICT COURT.

Requests were sent by the Administrative Office of the United States Courts to the clerks in all districts in which there were applications for habeas corpus subsequent to a denial of certiorari in the October 1950 Term. In addition to a request for all docket entries and orders or opinions, the clerks were requested to send copies of all pertinent papers filed in the action by the applicant or to answer a questionnaire concerning those papers. In the bulk of the cases, the original papers or copies of them were forwarded to the Administrative Office; these papers, together with the answered questionnaires in the other cases, were the basis of the following analysis.

A. *The Applications for Habeas Corpus.*

Three applications for habeas corpus had been withdrawn and were unavailable; of the remaining 123, 17 were drawn by lawyers. Thirty-four failed to meet the minimum standards for showing some degree of familiar-

[13] See Rules Sup. Ct. 38 (5), 38½.

ity with law referred to in connection with the petitions for certiorari.[14] Of 122 applications for which data were available, 101 were typed or printed. The number of pages ran slightly less than in the petitions for certiorari;[15] 67 applications for habeas corpus contained 9 pages or less, while 56 contained 10 or more.

B. *Supporting Papers Filed: Reference to Certiorari.*

Table 2 below shows to what degree the applicant informed the District Court of the previous certiorari proceedings, and demonstrates that in about 10% of the cases there was not even a reference by the applicant to the fact that he had petitioned for certiorari. Further, in the large majority of cases, there was simply an allegation that a petition for certiorari had been filed and denied. In less than 10% of the cases did the applicant file any papers which would serve to indicate to the District Court what questions were before the Supreme Court.

TABLE 2. FILING OF PETITION FOR CERTIORARI IN DISTRICT COURT[16]

Total Cases for which data available		123	100.0%
Petition for Certiorari filed:			
Certified Petition	1		
Uncertified Petition	10		
Excerpts from Petition	1		
Total, petition or excerpts filed		12	9.8
Mere reference to denial of certiorari	98		
No reference to certiorari proceedings	13		
Total, no information as to contents of petition		111	90.2

[14] See p. 516, *supra.*

[15] See p. 516, *supra.*

[16] These figures reflect only the information or papers filed by the applicant and not any information or papers filed by the State or given the District Judge in oral argument. However, it can fairly be

C. *Supporting Papers Filed: Reference to State Proceedings.*

Somewhat fewer papers, on a percentage basis, were filed by applicants in the District Courts than in the Supreme Court concerning the record in the State courts. There seems no explanation for this difference.[17] Of chief significance, however, was the extent to which papers filed in the District Courts were alleged to have been presented to the Supreme Court in the petition for certiorari. It is clear that the District Courts may have learned in oral argument or by other means whether the papers had been filed previously in the Supreme Court, but since such information was thought impossible to obtain, it was necessary to limit the inquiry to allegations that the papers had also been before the Supreme Court. The almost negligible number of cases in which the papers filed were alleged also to have been before the Supreme Court is striking. Even in cases conducted throughout by apparently competent counsel, such allegations were often not made. The failure to make these allegations may reflect either a fear of counsel or applicants without counsel that a demonstration of the presentation made to the Supreme

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asserted that at least in those cases where the entire files of the District Court were sent in response to the questionnaires, the pleadings of the State only occasionally referred to the denial of certiorari and almost never gave any information concerning the petition or the papers filed in the Supreme Court.

[17] In a few cases, the district clerks may not have given the requested information in sufficient detail. However, in all cases where any such deficiency was apparent, second requests for information were sent out and answers received, so that only those cases where the deficiency was not apparent would be in error. From the excellence of the response in most cases to the questionnaires, it seems unlikely that whatever error arises from cases in which the deficiency of the answers was not apparent could account for the discrepancies in the figures.

Court would prejudice their cases or perhaps a feeling that it is unimportant to the District Judge that the papers had also been before the Supreme Court. In any event, it has not been a practice, apparently, to allege what papers were before the Supreme Court. Columns 2 and 3 of Table 1, *supra,* set out information exactly parallel to that contained in Column 1, which shows what papers from the State proceedings were filed in the Supreme Court. Column 2 shows the same information for the District Court, and Column 3 shows how many of the papers before the Supreme Court and then filed in the District Court were alleged to have been filed in the Supreme Court. Comparison of Columns 1 and 3 shows to what extent papers actually before the Supreme Court were alleged to have been there. For example, in 30 cases the Supreme Court had some information concerning the opinion in the State proceedings. The District Court was told, however, that the opinion had been before the Supreme Court in only 3 of those 30 cases. Column 2 shows that altogether there were 21 cases in which the District Courts had information concerning the opinion.

A synoptic view of the comparisons made in Table 1 can be had by comparing the line indicating the number of cases in which the record or excerpts were filed. Thus, in over 80% of the cases, the Supreme Court had some part of the State court record, while in just over 70% of the cases, the District Court had some part of the State court record. In less than 6% of the cases was the District Court told by allegation that the parts of the record before it had been in the Supreme Court.

D. *Issues Raised.*

The issues raised were of course approximately the same as those raised in the Supreme Court, with only in-

substantial variation from the figures given above [18] for the types of claims raised in the Supreme Court. But of some significance was a comparison of the claims in the Supreme Court with those made by the same petitioners later in the District Courts. In the 125 cases for which data were available, the chief claim made in the Supreme Court was also the chief claim made in the District Court in 105 cases. That number, of course, is subject to some subjective error because of possibly differing interpretations of what the chief claim of an unclear and unlawyer-like petition is. Perhaps more significant are summaries made which show that the claim that was considered the chief claim in the Supreme Court reappeared, but not necessarily as the chief claim, in 107 of the District Court cases; conversely, in 117 cases, the chief claim before the District Court had been raised in the Supreme Court petition. These data indicate only that it cannot always be assumed that even on the same record and in the same course of proceedings, the emphasis on various claims raised will be the same. Further, in some cases, the claims raised in the District Courts may not have been made at all in the Supreme Court.

E. *Disposition of the Cases in the District Courts.*

In only 1 case of the 126 was the writ of habeas corpus granted. The District Court had originally denied the application for the writ because of a reluctance to review an application already passed on by the highest State court, but after reversal on appeal,[19] the writ was

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[18] See p. 520, *supra.*

[19] *Anderson* v. *Eidson,* 191 F. 2d 989. A letter from the office of the Jackson County Sheriff, Kansas City, Missouri, to Mr. Will Shafroth, Chief of the Division of Procedural Studies and Statistics, advises that the applicant was remanded to the custody of the Sheriff and the case was dismissed by the Jackson County prosecutor

granted. In 120, the application for the writ has been denied, and 5 are still pending, 1 on remand from appeal. Table 3 sets out the extent to which appeal to the Court of Appeals has been sought or taken. It shows that there have been decisions on appeal in 14 cases with reversals in 3. Of those 3 cases reversed and remanded, one is pending, in one the writ has been granted and in the third the application was withdrawn.

TABLE 3. APPEAL FROM DISTRICT COURT DECISIONS

Total Cases for which data available	126
No entries as to appeal on District Court docket	66
Certificate of probable cause denied, or leave to appeal *in forma pauperis* denied	29
Appeal dismissed; mandamus dismissed	5
Appeal pending	8
Affirmed on appeal	11
Reversed and remanded on appeal	3

A variety of procedures were adopted in these cases by the District Courts in dealing with the applications. Chief among the orders entered other than to dismiss the applications without more were orders to show cause or to answer, as Table 4 shows. In 23 cases, a lawyer was appointed either as an *amicus* or as counsel for the applicant. In some cases, the writ of habeas corpus was issued to bring the applicant before the Court. Table 4 shows which of the devices were used and in what combinations.

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for lack of available witnesses on December 6, 1951, about one and one-half years after applicant had first raised the claim in the State courts. He had presented his claim to two State courts, the United States Supreme Court, the Federal District Court, and the Court of Appeals for the Eighth Circuit, which reversed a refusal below to grant a hearing and remanded. The discharge of the prisoner occurred almost 20 years after his arrest and conviction on a plea of guilty on several unrelated counts, one of them capital.

TABLE 4. PROCEDURES USED IN DISPOSING OF APPLICATIONS

Total Cases for which data available	123	100.0%
Applications disposed of without more	56	45.6%
Orders to Show Cause or Answer:		
Order to Show Cause	37	
Order to Show Cause; Counsel appointed for applicant	4	
Order to Answer	3	
Order to Answer; *Amicus* appointed	3	
Writs of Habeas Corpus issued:		
Writ issued	2	
Writ issued; Counsel appointed for applicant	3	
Writs and Orders:		
Writ Issued; Order to Show Cause	1	
Writ Issued; Order to Show Cause; Counsel appointed for applicant	5	
Lawyers Appointed:		
As *amicus*, in combination with other orders already listed above	(3)	
As counsel for applicant, in connection with other orders already listed above	(12)	
As *amicus* without other order	2	
As counsel for applicant without other order	6	

A hearing of some kind was given in 44 cases of the 122 for which data are available.[20] The other 22 cases not disposed of without more were disposed of by withdrawal of the application (one case) or after the answer, the report of the *amicus*, or both. Certain data concerning the hearings are set out in Table 5. Table 5 shows what procedures were used and how long the hearing lasted. It shows that the applicant was present at 26

[20] In some cases, it was difficult to determine from the docket entries whether a hearing had been held. A procedure was considered a hearing if at least one party, the State or the applicant, had appeared in court and argued points of law or fact to the Court, in addition to all procedures resulting in docket entries stating that a hearing had been held.

hearings, with counsel also in 17 of those cases. The applicant was represented by counsel in 31 cases, but the applicant himself was not present in 14 of those 31 cases. The length of the hearings for which data were available was an hour or less in two-thirds of the cases.

TABLE 5. PRESENCE AT HEARING AND LENGTH OF HEARING

I. Total Cases in which hearings held	44
Data unavailable	1
Applicant and counsel present	17
Applicant present without counsel	9
Applicant absent but represented by counsel [21]	14
Applicant absent and not represented by counsel	3
II. Total Cases for which data as to length of hearing available [22]	24
Length of hearing:	
Fifteen minutes or less	2
Fifteen to thirty minutes	8
Thirty minutes to one hour	6
Total, one hour or less	16
Two hours	1
Two and a half hours	1
Three hours	1
Four hours	4
Three days	1
Total, over one hour	8

[21] Including one case in which counsel was present but in which it does not appear whether applicant was present.

[22] In two of the cases in which there was no information as to the length of the hearing, there is information concerning the length of the transcript made by the court stenographer. In one, it was 20 pages; in the other 46. In five cases for which information was available as to the length of the hearing, data were also given showing the length of the transcript. One of the hearings lasting one hour had a transcript of 36 pages. The hearing lasting three hours had a transcript of 15 pages. One of the hearings lasting four hours had a transcript of 28 pages, another one of 79 pages. The hearing lasting three days had a transcript of 319 pages.

The average time of disposition of applications for habeas corpus in the District Courts was 59.4 days,[23] as compared with the disposition time in the Supreme Court of 52.5 days. In the District Court, however, only 56 applications were dismissed without more, while in the Supreme Court all but 35, or 91 petitions for certiorari, were disposed of without further action such as the filing of a response by the State. For whatever significance it might have, the important figure seemed to be that showing the number of cases in which the District Court disposition time was greater than in the Supreme Court; of the 122 cases for which figures are available, 45 took longer from the time of filing until denial of the application for habeas corpus than they had in the Supreme Court. Of those 45, only 4 had been dismissed without further pleadings or action of some sort.

In 98 cases, the District Courts indicated their reasons for denying the applications for habeas corpus. As will be seen from Table 6, the District Courts decided only about half of the cases directly on the merits, either holding against the applicant on the facts or on his constitutional claim. In 45, or almost half, of the 98 cases, the application was denied on various grounds bearing on the relation between the Federal and State courts in these cases. Twenty-nine of these 45 denials were based on the applicant's failure to exhaust the State remedy. Since this reason was often not amplified, it is not possible

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[23] The time was computed from the day of filing of the application for habeas corpus until its dismissal. It does not take into account any appeal time. It is slightly inaccurate because most cases are filed *in forma pauperis*, so that a few days may elapse between the time the Court receives the application and the time it grants leave to file *in forma pauperis*. In all cases where the docket or other papers indicated the date such an application was received, that date was used rather than the date shown by the docket as the date on which the application was filed.

TABLE 6. GROUNDS FOR DENIAL OF APPLICATIONS IN DISTRICT COURTS

Total Cases in Survey		126
Pending	5	
Writ granted	1	
Total cases for which data available	120	
I. *Reasons Stated for Dismissal.*		
Reasons not going directly to the merits:		
Issue fairly considered in State Court	7	
Applicant had his day in State Court, and Federal Courts will not ordinarily reexamine	9	
Failure to exhaust State remedy	29	
Total		45
Reasons going directly to the merits:		
Want of a federal question	21	
Applicant not within invoked Federal doctrine[24]	8	
Claim not supported by facts	17	
Insufficient facts alleged in support of claim	2	
Total		48
Miscellaneous:		
Application withdrawn by applicant	3	
Lack of jurisdiction—wrong District	1	
Same issue formerly considered in a Federal Court	1	
Total		5
No Reason Stated except that applicant not entitled to writ, or lack of jurisdiction to grant	22	
II. *Probable Reasons where no reason stated.*		
Issue fairly considered in State Court	1	
Want of a Federal question	18	
Applicant not within invoked Federal doctrine	1	
Claim not supported by the facts	2	

[24] That is, the claim is in an area in which Federal protection is afforded, *e. g.*, representation by counsel, but the applicant does not show that his case comes within the requirements for protection, *e. g.*, ignorance and inability adequately to defend himself.

to classify these cases further. But from those cases in which a more detailed statement of the reason was made and from other information available in some cases, it is possible to say that there were several views below as to what the requirement of "exhaustion" implied. In some cases, the applicant had not complied with formal requirements, such as those prescribing the time of filing or the kind of papers to be filed for an appeal to a higher State court. In others, the applicant had fully invoked one remedy, but other State remedies were still available, or the remedy already invoked was, under the State procedural rules, available again. In some cases, of course, the applicant failed to allege or show any real attempt to invoke a State remedy. The other 16 of the 45 cases not decided directly on the merits were disposed of as the result of varying degrees of reliance on the State adjudication. As Table 6 shows, in some cases the judges below stated that the applicant had had his day in the State courts and the Federal courts will not ordinarily reexamine State denials of relief to prisoners, while in others they felt that the claim had been fairly considered in the State courts.

MR. JUSTICE JACKSON, concurring in the result.

Controversy as to the undiscriminating use of the writ of habeas corpus by federal judges to set aside state court convictions is traceable to three principal causes: (1) this Court's use of the generality of the Fourteenth Amendment to subject state courts to increasing federal control, especially in the criminal law field; (2) *ad hoc* determination of due process of law issues by personal notions of justice instead of by known rules of law; and (3) the breakdown of procedural safeguards against abuse of the writ.

1. In 1867, Congress authorized federal courts to issue writs of habeas corpus to prisoners "in custody in vio-

lation of the Constitution or laws or treaties of the United States." [1] At that time, the writ was not available here nor in England to challenge any sentence imposed by a court of competent jurisdiction.[2] The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.[3] It might have been expected that if Congress intended a reversal of this traditional concept of habeas corpus it would have said so. However, this one sentence in the Act eventually was construed as authority for federal judges to entertain collateral attacks on state court criminal judgments.[4] Whatever its justification, it created potentialities for conflict certain to lead to the antagonisms we have now, unless the power given to federal judges were responsibly used according to lawyerly procedures and with genuine respect for state court fact finding.

But, once established, this jurisdiction obviously would grow with each expansion of the substantive grounds

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[1] 28 U. S. C. § 2241 (c)(3).

[2] *Ex parte Ferguson,* [1917] 1 K. B. 176, 179; *Ex parte Lees,* El. Bl. & El. 828, 120 Eng. Rep. 718; *In re Dunn,* 5 C. B. 215, 136 Eng. Rep. 859; Habeas Corpus Act of 1679, 31 Car. II, c. 2; *Ex parte Watkins,* 3 Pet. 193, 202.

[3] *Darnel's Case,* 3 How. St. Tr. 1 (1627). For this purpose, the writ has not been conspicuously successful in the United States. I have reviewed its failures, especially in wartimes, in Wartime Security and Liberty under Law, 1 Buff. L. R. 103; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537.

[4] See the equivocal discussion of the question in *Frank* v. *Magnum,* 237 U. S. 309, 326–332, and the more explicit assumption of the dissent, *id.,* at 348. An earlier case, *Ex parte Royall,* 117 U. S. 241, contained a dictum to the effect that legislative jurisdiction—the validity of the statute under which conviction was had in the state court—could be challenged on habeas corpus in the federal courts. While this represents a certain expansion of traditional notions of jurisdiction in the judicial sense, it by no means supports the broad reach given to federal habeas corpus by recent cases. See also *Moore* v. *Dempsey,* 261 U. S. 86; *Mooney* v. *Holohan,* 294 U. S. 103.

for habeas corpus. The generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states. The expansion now has reached a point where any state court conviction, disapproved by a majority of this Court, thereby becomes unconstitutional and subject to nullification by habeas corpus.[5]

This might not be so demoralizing if state judges could anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them. But they cannot. Of course, considerable uncertainty is inherent in decisional law which, in changing times, purports to interpret implications of constitutional provisions so cryptic and vagrant. How much obscurity is inevitable will be a matter of opinion. However, in considering a remedy for habeas corpus problems, it is prudent to assume that the scope and reach of the Fourteenth Amendment will continue to be unknown and unknowable, that what seems established by one decision is apt to be unsettled by another, and that its interpretation will be more or less swayed by contemporary intellectual fashions and political currents.

We may look upon this unstable prospect complacently, but state judges cannot. They are not only being gradually subordinated to the federal judiciary but federal courts have declared that state judicial and other officers are personally liable to federal prosecution and to

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[5] An idea of the uncertainty and diversity of views in this field may be gleaned from a comparison of *Rochin* v. *California*, 342 U. S. 165, with *Wolf* v. *Colorado*, 338 U. S. 25, and *Adamson* v. *California*, 332 U. S. 46.

civil suit by convicts if they fail to carry out this Court's constitutional doctrines.[6]

2. Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.

A manifestation of this is seen in the diminishing respect shown for state court adjudications of fact. Of course, this Court never has considered itself foreclosed by a state court's decision as to the facts when that determination results in alleged denial of a federal right. But captious use of this power was restrained by observance of a rule, elementary in all appellate procedure, that the findings of fact on a trial are to be accepted by an appellate court in absence of clear showing of error. The

[6] This Court's decision in *Screws* v. *United States*, 325 U. S. 91, as the dissenters anticipated, has led a Federal Court of Appeals to hold that federal law enforced in federal courts imposes personal liability upon state judicial officers, though that court admits that "The result is of fateful portent to the judiciary of the several states." *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240, 250. Contrast to this the absolute immunity from suit enjoyed by federal officials, even in administrative capacities. *Gregoire* v. *Biddle*, 177 F. 2d 579. While the *Screws* decision held out promise of protection for state officials by requiring that any denial of constitutional right must be proved to be wilful in the sense of knowing and intentional, that protection has since been withdrawn. Another Court of Appeals upheld a conviction based on a charge that wilfulness and intent are "presumed and inferred from the result of the action." 189 F. 2d 711, 714. This Court, against my written dissent calling attention to its effect, refused review. *Koehler* v. *United States*, 342 U. S. 852.

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trial court, seeing the demeanor of witnesses, hearing the parties, giving to each case far more time than an appellate court can give, is in a better position to unravel disputes of fact than is an appellate court on a printed transcript. Recent decisions avow no candid alteration of these rules, but revision of state fact finding has grown by emphasis, and respect for it has withered by disregard.[7]

3. The fact that the substantive law of due process is and probably must remain so vague and unsettled as to invite farfetched or borderline petitions makes it important to adhere to procedures which enable courts readily to distinguish a probable constitutional grievance from a convict's mere gamble on persuading some indulgent judge to let him out of jail. Instead, this Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own.[8] Judged by our own disposition of habeas corpus matters,

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[7] See, *e. g.*, *United States* v. *Oregon State Medical Society*, 343 U. S. 326, for a recent example of the application of the presumption in favor of a lower federal court's finding of fact. Compare *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68; and *Malinski* v. *New York*, 324 U. S. 401, with the above for illustrations of cases in which this salutary presumption in favor of state court findings was disregarded in fact if not in theory.

[8] There were filed in federal district courts during 1941 one hundred twenty-seven petitions for habeas corpus challenging state convictions; in 1943 there were two hundred sixty-nine; in 1948 five hundred forty-three; in 1952 five hundred forty-one. Speck, Statistics on Federal Habeas Corpus, 10 Ohio St. L. J. 337, shows that during the period from 1943 through 1945 there were a high number of petitions filed by those convicts who had filed at least one such petition in *federal* court before. In federal courts in New Hampshire and South Dakota, the percentage of the total petitions made up by repeaters was 50%. The percentages for the larger states on which statistics were then available are as follows: California, 12%; Illinois, 19%; Massachusetts, 20%; Missouri, 21%; New Jersey, 17%; New York,

they have, as a class, become peculiarly undeserving.[9] It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. Nor is it any answer to say that few of these petitions in any court really result in the discharge of the petitioner.[10] That is the condemnation of the procedure which has encouraged frivolous cases. In this multiplicity of worthless cases, states are compelled to default or to defend the integrity of their judges and their official records, sometimes concerning trials or pleas that were closed many years ago.[11] State Attorneys General recently have come habitually to ignore these proceedings, responding only when specially requested and sometimes

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18%; Pennsylvania, 22%; Texas, 25%. These figures show an unnecessary burden on the federal courts by quantitative as well as dramatic tests.

[9] See Speck, *supra*, Table 3, p. 349.

[10] Statistics of the Administrative Office of the United States Courts for the period 1946–1952 show that, in 1946, 2.8% of the petitioners were successful; in 1952, 1.8% were successful.

[11] Pages full of numbers fail to indicate what the states must contend with as vividly as the history of particular litigation. The *Wells* litigation in California is an object lesson in conflict. Wells was sentenced to death by the California trial court, and this judgment was affirmed by the Supreme Court of California in an opinion which gave extended consideration to the appellant's contentions. *People* v. *Wells*, 33 Cal. 2d 330, 202 P. 2d 53. This Court denied certiorari, *Wells* v. *California*, 338 U. S. 836. Wells, without seeking habeas corpus in state court, then petitioned a federal district judge in California for habeas corpus. That judge took the unusual step of passing on the merits of the case in spite of the fact that state remedies had not been exhausted and the prisoner had to be remitted to the state courts. The district judge held on the merits that the California courts had misapplied California law. *Ex parte Wells*, 90 F. Supp. 855. When the petitioner applied to the Supreme Court of California for a writ of habeas corpus, as he was instructed to do by the district judge, that court adhered to its prior view as to what the

not then. Some state courts have wearied of our repeated demands upon them and have declined to further elucidate grounds for their decisions.[12] The assembled

law of California was. *In re Wells,* 35 Cal. 2d 889, 221 P. 2d 947. This Court again denied certiorari. *Wells* v. *California,* 340 U. S. 937. Thereafter the same federal judge, although now conceding that he must take California law from California courts, voided the conviction on a federal ground not even mentioned in his earlier opinion. *Ex parte Wells,* 99 F. Supp. 320. The opinions of the district judge show that he was well aware of the difficulties presented by the procedure, but felt he had no alternative in the light of this Court's decisions. Indeed, he has contributed the lessons of his own experience in this field in Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F. R. D. 313. Another caricature of the great writ in action is the *Adamson* litigation in California. Adamson was sentenced to death in the California trial court in 1944. The Supreme Court of California affirmed the judgment of conviction in 1946. *People* v. *Adamson,* 27 Cal. 2d 478, 165 P. 2d 3. This Court *granted* certiorari, heard the case on the merits, and *affirmed. Adamson* v. *California,* 332 U. S. 46. On January 30, 1948, just one week before the date set for his execution, Adamson petitioned the Supreme Court of California for habeas corpus, and this petition was denied. This Court denied application for a stay and denied certiorari to the Supreme Court of California. *Adamson* v. *California,* 333 U. S. 831. Later on the same day that this Court denied certiorari, a judge of the United States District Court for the Northern District of California issued a stay of execution of the sentence. Then the District Court denied the writ and denied a certificate of probable cause to appeal. In *Ex parte Adamson,* 167 F. 2d 996, a judge of the United States Court of Appeals denied an application for a certificate of probable cause. This Court again denied certiorari. *Ex parte Adamson,* 334 U. S. 834. Even this was not the end, however, for in 1949 we find Adamson appealing to the Supreme Court of California from a denial of an application for a writ of *coram nobis.* That court then took occasion to question the good faith of the proceedings. 34 Cal. 2d 320, 338, 210 P. 2d 13, 22. Certainly the use of the federal courts as aids in such delaying tactics as are evidenced here does not elevate the stature of the writ of habeas corpus. We have no mythical abuse here but a very real problem of harassment of the state.

[12] *Dixon* v. *Duffy,* 344 U. S. 143.

Chief Justices of the highest courts of the states have taken the unusual step of condemning the present practice by resolution.[13]

It cannot be denied that the trend of our decisions is to abandon rules of pleading or procedure which would

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[13] Conference of Chief Justices—1952, 25 State Government, No. 11, p. 249 (Nov. 1952):

"Whereas it appears that by reason of certain principles enunciated in certain recent federal decisions, a person whose conviction in a criminal proceeding in a State Court has thereafter been affirmed by the highest court of that State, and whose petition for a review of the State Court's proceedings has been denied by the Supreme Court of the United States, may nevertheless obtain from a Federal district judge or Court, under a writ of habeas corpus, new, independent, and successive hearings based upon a petition supported only by the oath of the petitioner and containing only such statement of facts as were, or could have been, presented in the original proceedings in the State Courts;

"And whereas the multiplicity of these procedures available in the inferior Federal Courts to such convicted persons, and the consequent inordinate delays in the enforcement of criminal justice as the result of said Federal decisions will tend toward the dilution of the judicial sense of responsibility, may create grave and undesirable conflicts between Federal and State laws respecting fair trial and due process, and must inevitably lead to the impairment of the public confidence in our judicial institutions;

"Now therefore be it resolved that it is the considered view of the Chief Justices of the States of the Union, in conference duly assembled, that orderly Federal procedure under our dual system of government should require that a final judgment of a State's highest court be subject to review or reversal only by the Supreme Court of the United States.

"Be it further resolved that the Chairman of the Conference of Chief Justices be authorized, and he is hereby directed, to appoint a special committee to give study to the grave questions and potential complications likely to ensue if the power to review or void state court judgments continues to be recognized as lying in any courts of the Federal judicial system, save and except the Supreme Court of the United States: and that said special committee report its findings and recommendations at the next regular meeting of the Conference."

protect the writ against abuse. Once upon a time the writ could not be substituted for appeal or other reviewing process but challenged only the legal competence or jurisdiction of the committing court.[14] We have so departed from this principle that the profession now believes that the issues we *actually consider* on a federal prisoner's habeas corpus are substantially the same as would be considered on appeal.[15]

Conflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court sitting without a jury. Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

As to the pleading requirements in habeas corpus, what has happened may best be learned by comparison of the meticulously pleaded facts and circumstances relied upon by this Court's opinion in *Moore* v. *Dempsey,* 261 U. S. 86 (1923), and in *Mooney* v. *Holohan,* 294 U. S. 103 (1935), with condonation of their absence in *Price* v. *Johnston,* 334 U. S. 266 (1948). It really has become necessary to plead nothing more than that the prisoner is in jail, wants to get out, and thinks it is illegal to hold

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[14] *Ex parte Watkins,* 3 Pet. 193, 202.

[15] Such was the view expressed by the Solicitor General of the United States at the Bar of this Court during argument of *Martinez* v. *Neelly,* affirmed by an equally divided Court, 344 U. S. 916. His adversary agreed.

him.[16] If he fails, he may make the same plea over and over again.[17]

Since the Constitution and laws made pursuant to it are the supreme law and since the supremacy and uniformity of federal law are attainable only by a centralized source of authority, denial by a state of a claimed federal right must give some access to the federal judicial system. But federal interference with state administration of its criminal law should not be premature and should not occur where it is not needed. Therefore, we have ruled that a state convict must exhaust all remedies which the state affords for his alleged grievance before he can take it to any federal court by habeas corpus.

The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restriction by the state should be respected by federal courts.

Assuming that a federal question not reachable on appeal is properly presented by habeas corpus and decided adversely by the highest competent court of the state, should the prisoner then come to this Court and ask us to review the record by certiorari or should he go to the district court and institute a new federal habeas corpus proceeding? *Darr* v. *Burford,* 339 U. S. 200, as

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[16] *Price* v. *Johnston, supra.*

[17] In *Price* v. *Johnston, supra,* the lower federal courts were reversed for dismissing the convict's fourth petition. See also statistics as to repeaters in note 8, *supra.*

I understand it, held that in these circumstances the prisoner must apply to this Court for certiorari before he can go to any other federal court, because only by so doing could he exhaust his state remedy. Whatever one may think of that result, it does not seem logical to support it by asserting that this Court's certiorari power is any part of a state's remedy. An authority outside of the state imposes a duty upon the state to turn the case over to it, in a proceeding which makes the state virtually a defendant. To say that our command to certify the case to us is a state remedy is to indulge in fiction, and the difficulty with fictions is that those they are most apt to mislead are those who proclaim them.

But now it is proposed to neutralize the artificiality of the process and counterbalance the fiction that our certiorari is a state remedy by holding that this step which the prisoner must take means nothing to him or the state when it fails, as in most cases it does.

The Court is not quite of one mind on the subject. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible. How can we say that the prisoner must present his case to us and at the same time say that what we do with it means nothing to anybody. We might conceivably take either position but not, rationally, both, for the two will not only burden our own docket and harass the state authorities but it makes a prisoner's legitimate quest for federal justice an endurance contest.

True, neither those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari. But all know that a majority, larger than can be mustered for a good many decisions, has found reason for not reviewing the case here. Because no one knows all that a denial means, does it mean that it means nothing?

Perhaps the profession could accept denial as meaningless before the custom was introduced of noting dissents from them. Lawyers and lower judges will not readily believe that Justices of this Court are taking the trouble to signal a meaningless division of opinion about a meaningless act.[18] It is just one of the facts of life that today every lower court does attach importance to denials and to presence or absence of dissents from denials, as judicial opinions and lawyers' arguments show.

The fatal sentence that in real life writes *finis* to many causes cannot in legal theory be a complete blank. I can see order in the confusion as to its meaning only by distinguishing its significance under the doctrine of *stare decisis,* from its effect under the doctrine of *res judicata.* I agree that, as *stare decisis,* denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of *res judicata* as applied either by state or federal courts. A civil or criminal judgment usually becomes *res judicata* in the sense that it is binding and conclusive even if new facts are discovered and even if a new theory of law were thought up, except for some provision for granting a new trial, which usually is discretionary with the trial court and limited in time.

It is sometimes said that *res judicata* has no application whatever in habeas corpus cases and surely it does not apply with all of its conventional severity. Habeas corpus differs from the ordinary judgment in that, although an adjudication has become final, the application

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[18] When petitioner in *Brown* v. *Allen* sought certiorari here after his appeal to the state court failed, two Justices dissented from the denial of certiorari. *Brown* v. *North Carolina,* 341 U. S. 943.

is renewable, at least if new evidence and material is discovered or if, perhaps as the result of a new decision, a new law becomes applicable to the case. This is quite proper so long as its issues relate to jurisdiction. But call it *res judicata* or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence. Nor is there any good reason why an identical contention rejected by a higher court should be reviewed on the same facts in a lower one.

The chief objection to giving this limited finality to our denial of certiorari is that we pass upon these writs of habeas corpus so casually or upon grounds so unrelated to their merits that our decision should not have the weight of finality. No very close personal consideration can be given by each Justice to such a multiplicity of these petitions as we have had and, as a class, they are so frivolous, so meaningless, and often so unintelligible that this worthlessness of the class discredits each individual application. If this deluge were reduced by observance of procedural safeguards to manageable proportions so that it would be possible to examine the cases with some care and to hear those that show merit, I think this objection would largely disappear. The fact is that superficial consideration of these cases is the inevitable result of depreciation of the writ. The writ has no enemies so deadly as those who sanction the abuse of it, whatever their intent.

If a state is really obtaining conviction by laws or procedures which violate the Federal Constitution, it is always a serious wrong, not only to a particular convict, but to federal law. It is not probable that six Justices would pass up a case which intelligibly presented this situation. But an examination of these petitions will show that few of them, tested by any rational rules of pleading, actually raise any question of law on which

the state court has differed from the understanding prevailing in this Court. The point on which we are urged to overrule state courts almost invariably is in their appraisal of facts. For example, the jury, the trial judge, and one or more appellate courts below have held that conflicting evidence proves a confession was voluntary; the prisoner wants us to say the evidence proves it was coerced. The court below found that the prisoner waived counsel and voluntarily pleaded guilty; he wants us to find that he did not. The jury and the trial judge below believed one set of witnesses whose testimony showed his guilt; he wants us to believe the other and to hold that he has been convicted by perjury. That is the type of factual issue upon which this Court and other federal courts are asked to intervene and upset state court convictions. There are plenty of good reasons why we should rarely do that, and even better reasons why the district court should not undertake to do it after we have declined to.

My conclusion is that whether or not this Court has denied certiorari from a state court's judgment in a habeas corpus proceeding, no lower federal court should entertain a petition except on the following conditions: (1) that the petition raises a jurisdictional question involving federal law on which the state law allowed no access to its courts, either by habeas corpus or appeal from the conviction, and that he therefore has no state remedy; or (2) that the petition shows that although the law allows a remedy, he was actually improperly obstructed from making a record upon which the question could be presented, so that his remedy by way of ultimate application to this Court for certiorari has been frustrated. There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the run-of-the-mill case certainly does not.

Whether one will agree with this general proposition will depend, I suppose, on the latitude he thinks federal courts should exercise in retrying *de novo* state court criminal issues. If the federal courts are to test a state court's decision by hearing new evidence in a new proceeding, the pretense of exhaustion of state remedies is a sham, for the state courts could not have given a remedy on evidence which they had no chance to hear. I cannot see why federal courts should hear evidence that was not presented to the state court unless the prisoner has been prevented from making a record of his grievance, with the result that there is no record of it to bring here on certiorari. Such circumstances would seem to call for an original remedy in the district courts which would be in a position to take evidence and make the record on which we ultimately must pass if there develops a conflict of law between a federal and state court.

If this Court were willing to adopt this doctrine of federal self-restraint, it could settle some procedures, rules of pleading and practices which would weed out the abuses and frivolous causes and identify the worthy ones. I know the difficulty of formulating practice rules and their pitfalls. Nor do I underestimate the argument that the writ often is petitioned for by prisoners without counsel and that they should not be held to the artificialities in pleading that we expect in lawyers. But I know of no way that we can have equal justice under law except we have some law. I suggest some general principles which, if adhered to, would reduce the number of frivolous petitions, make decision upon them possible at an earlier time and alleviate some of the irritation that is developing over ill-considered federal use of the writ to slap down state courts.

First, habeas corpus shall not (in absence of state law to the contrary) raise any question which was, or could have been, decided by appeal or other procedure for re-

view of conviction. In the absence of showing to the contrary, habeas corpus will be deemed to lie only for defects not disclosed on the record, going to the power, legal competence or jurisdiction of the committing state court.

Second, every petition to a federal court is required, and those to a state court may be required, by state law to contain a plain but full statement of the facts on which it is based. Unless it states facts which, if proved, would warrant relief, the applicant is not entitled as of right to a hearing. Technical forms or artificialities of pleading will not be required.

Presumably a federal court will not release a convict until he proves facts which show invalidity of his conviction. If proof is to be required, it is no hardship to require a simple statement of what it will be. A petitioner should be given benefit of liberal construction, of all usual privileges of amendment, and, if the court finds a probably worthy case, appointment of counsel to aid in amending the petition and presenting the case.

Third, petitions to federal courts are required, and those to state courts may be required, to set forth every previous application to any court for relief on any grounds. If the current petition is made upon the same grounds as an earlier one, it should state fully any evidence now available in its support that was not offered before and explain failure to present it. On the jurisdictional questions appropriate for habeas corpus, the petitioner may not be barred from proof by newly discovered evidence, but it is not asking too much that his petition disclose that he has it and a basis for appraising its relevance and effect. He should not be precluded from raising new grounds of unconstitutionality in a later petition, especially in view of the unsettled character of our constitutional doctrines of due process. But the facts that make the new grounds applicable should appear. If fed-

eral relief is sought on the grounds that state law affords no remedy, or his resort thereto has been obstructed and he has been unable to present his case to a state court, the facts relied on should be clearly and fully set forth.

Much probably may be said in criticism of my statement of these principles but nothing, I am convinced, against their historical authenticity as part of the traditional law of habeas corpus or against their application now to stop abuses so grave that they foreshadow legislative restriction of the writ. They do not foreclose worthy causes but earmark them for the serious treatment they deserve. They will not even wholly eliminate frivolous petitions but will discourage them by exposing their frivolity at an earlier stage.

Society has no interest in maintaining an unconstitutional conviction and every interest in preserving the writ of habeas corpus to nullify them when they occur. But the Constitution does not prevent the state courts from determining the facts in criminal cases. It does not make it unconstitutional for them to have a different opinion than a federal judge about the weight to be given to evidence. My votes in the cases under review and on other petitions and reviews will be guided as nearly as I can by the principles set forth herein.

I concur in the result announced by MR. JUSTICE REED in these three cases.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The four petitioners in these cases are under sentences of death imposed by North Carolina state courts. All are Negroes. Brown and Speller were convicted of raping white women; the two Daniels, aged 17 when arrested, were convicted of murdering a white man. The State Supreme Court affirmed and we denied certiorari in all

the cases. These are habeas corpus proceedings which challenge the validity of the convictions.

I agree with the Court that the District Court had habeas corpus jurisdiction in all the cases including power to release either or all of the prisoners if held as a result of violation of constitutional rights. This I understand to be a reaffirmance of the principle embodied in *Moore* v. *Dempsey,* 261 U. S. 86. I also agree that in the exercise of this jurisdiction the District Court had power to hear and consider all relevant facts bearing on the constitutional contentions asserted in these cases. I disagree with the Court's conclusion that petitioners failed to establish those contentions. The chief constitutional claims throughout have been and are: (a) extorted confessions were used to convict; (b) Negroes were deliberately excluded from service as jurors on account of their race. For the following reasons I would reverse each of the judgments denying habeas corpus.

First. In denying habeas corpus in all the cases, the District Court felt constrained to give and did give weight to our prior denials of certiorari. So did the Court of Appeals. I agree with the Court that this was error but disagree with its holding that the error was harmless. It is true that after considering our denials of certiorari as a reason for refusing habeas corpus, the district judge attempted to pass upon the constitutional questions just as if we had not declined to review the convictions. But the record shows the difficulty of his attempt to erase this fact from his mind and I am not willing to act on the assumption that he succeeded in doing so. Both the jury and confession questions raised in these death cases have entirely too much record support to refuse relief on such a questionable assumption. I would therefore reverse and remand all the cases for the district judge to consider and appraise the issues free from his erroneous

belief that this Court decided them against petitioners by denying certiorari.

Second. Brown v. *Allen,* No. 32. Brown's death sentence for rape rests on an indictment returned by a Forsyth County grand jury. We recently reversed five North Carolina convictions on the ground that there had been a systematic racial exclusion of Negroes from Forsyth County's juries for many years prior to 1947. *Brunson* v. *North Carolina,* 333 U. S. 851 (1948). Upon a review of the evidence in Brown's habeas corpus proceeding this Court holds that Forsyth County's discriminatory jury practice was abandoned in 1949 when the old jury boxes were refilled. The testimony on which the Court relies is that the names put in the 1949 box were taken indiscriminately from the list of county taxpayers, 16% of whom were Negroes, 84% whites. Other evidence relied on was that since 1949 four to seven Negroes have been included in each jury venire of 44 to 60. The concrete effect of the new box in this case was stated by the North Carolina Supreme Court to be this:

> "One Negro woman served on the grand jury and at least one prospective Negro juror was tendered to the defendant for the petit jury and was excused or rejected by his counsel." *State* v. *Brown,* 233 N. C. 202, 205, 63 S. E. 2d 99, 101.

The foregoing evidence does show a partial abandonment of the old discriminatory jury practices—since 1949 a small number of Negroes have regularly been summoned for jury duty. But proof of a lesser degree of discrimination now than before 1949 is insufficient to show that impartial selection of jurors which the Constitution requires. Negroes are about one-third of Forsyth County's population. Consequently, the number of Negroes now called for jury duty is still glaringly disproportionate to their percentage of citizenship. It is not possible to at-

tribute either the pre-1949 or the post-1949 disproportions entirely to accident. And the state has not produced evidence to show that the partial continuation of the long-standing failure to use Negro jurors is due to some cause other than racial discrimination. Cf. *Patton* v. *Mississippi,* 332 U. S. 463, 466, 468–469. Recognizing this difficulty the Court sanctions the continued disproportions because they were the result of selecting jurors exclusively from the county tax list. But even this questionable method of selection falls short of showing a genuine abandonment of old discriminatory practices. Certainly discriminatory results remained. I do not believe the Court should permit this tax list technique to be treated as a complete neutralizer of racial discrimination.

Third. Speller v. *Allen,* No. 22. The jury that tried Speller was drawn from Vance County, North Carolina. Before this trial no Negro had served on a Vance County jury in recent years. No Negro had even been summoned. That this was the result of unconstitutional discrimination is made clear by the fact that Negroes constitute 45% of the county's population and 38% of its taxpayers. The Court holds, however, that this discrimination was completely cured by refilling the jury box with the names of 145 Negroes and 1,981 whites. Such a small number of Negro jurors is difficult to explain except on the basis of racial discrimination. The Court attempts to explain it by relying upon another discrimination, one which can hardly be classified as most appealing in a democratic society. What the Court apparently finds is that Negroes were excluded from this new jury box not because they were Negroes but because they happened to own less property than white people. In other words, the Court finds as a fact that the discrimination, if any, was based not on race but on wealth—the jurors were selected from taxpayers with "the most property." The Court

then even declines to pass on the constitutionality of this property discrimination on the ground that petitioner's objections were based on racial, not on property, discriminations. I cannot agree to such a narrow restriction of petitioner's objections to the jury that brought in the death verdict. Jury discriminations here seem plain to me and I would not by-pass them.

Fourth. Daniels v. *Allen,* No. 20. Here also evidence establishes an unlawful exclusion of Negroes from juries because of race. The State Supreme Court refused to review this evidence on state procedural grounds. Absence of state court review on this ground is now held to cut off review in federal habeas corpus proceedings. But in the two preceding cases where the State Supreme Court did review the evidence, this Court has also reviewed it. I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none.

The following facts indicate the obviousness of discriminatory Negro exclusion from jury service in Pitt County where this case was tried.

Negroes constituted about 47% of the population of the county and about one-third of the taxpayers. But the jury box of 10,000 names included at most 185 Negroes. And up to and including the Daniels' trial no Negro had ever served on a grand jury in modern times. Petitioners made objection in ample time to juries so discriminatorily chosen.

The Court's conclusion not to consider and act on this manifest racial discrimination rests on these facts: After petitioners' death sentence they were granted an appeal *in forma pauperis* to the State Supreme Court. June *6th* the trial judge granted *60* days for their lawyers to make up and serve their "statement of case on appeal." Preparation of this statement (comparable to a bill of excep-

tions) consumed valuable time because of difficulty in getting the stenographic transcript. On completion petitioners' counsel on Friday, August *5th,* called the prosecuting attorney's office to serve him but found he was out of town. According to the record he and his family were away for the weekend at a beach. They returned home Sunday, but he did not get back to his office until Monday, August *8th.* Had the statement been delivered at his office by a sheriff on Friday the *60th* day, apparently there would have been compliance with North Carolina law. Instead it was receipted for at his office on the *61st* day, two days before his return from the beach. In the State Supreme Court the Attorney General moved to dismiss on the ground that the notice was one day late. Although admittedly the court had discretionary authority to hear the appeal, it dismissed the case. Petitioners were thereby prevented from arguing the point of racial discrimination and consequently it has never been passed on by an appellate court. This denial of state appellate review plus the obvious racial discrimination thus left uncorrected should be enough to make one of those "extraordinary situations" which the Court says authorizes federal courts to protect the constitutional rights of state prisoners. Cf. *Frisbie* v. *Collins,* 342 U. S. 519, 520–521.

The Court thinks that to review this question and grant petitioners the protections guaranteed by the Constitution would "subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." I cannot agree. State systems are not so feeble. And the object of habeas corpus is to search records to prevent illegal imprisonments. To hold it unavailable under the circumstances here is to degrade it. I think *Moore* v. *Dempsey,* 261 U. S. 86, forbids this. In that case Negroes had been convicted and sentenced to death by an all-white jury selected under a practice of systematic exclusion of Negroes from juries. The State

Supreme Court had refused to consider this discrimination on the ground that the objection to it had come too late. This Court had denied certiorari. Later a federal district court summarily dismissed a petition for habeas corpus alleging the foregoing and other very serious acts of trial unfairness, all of which had been urged upon this Court in the prior certiorari petition. This Court nevertheless held that the District Court had committed error in refusing to examine the facts alleged. I read *Moore* v. *Dempsey, supra,* as standing for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. Cf. *United States* v. *Kennedy,* 157 F. 2d 811, 813. Perhaps there is no more exalted judicial function. I am willing to agree that it should not be exercised in cases like these except under special circumstances or in extraordinary situations. But I cannot join in any opinion that attempts to confine the Great Writ within rigid formalistic boundaries.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

Nos. 22 and 32.

The Court is holding today that a denial of certiorari in habeas corpus cases is without substantive significance. The Court of Appeals sustained denials of applications for writs of habeas corpus chiefly because it treated our denial of a petition for certiorari from the original conviction in each of these cases as a review on the merits and a rejection of the constitutional claims asserted by these petitioners. In short, while the only significance of the denials of certiorari was a refusal to review, the Court of Appeals for all practical purposes, though disavowing the full technical import of *res judicata,* treated substantively empty denials as though this Court had

examined and approved the holdings of the Supreme Court of North Carolina that there was no purposeful discrimination against Negroes in the selection of juries in these cases.

This Court could have reached the constitutional claims in controversy had it seen fit to review the cases. It declined to do so, and that is all that the orders in 340 U. S. 835 and 341 U. S. 943 signify. Accordingly, the proceedings were left precisely as though the petitions for certiorari had not been filed here and habeas corpus had been brought initially in the District Court, as in *Frisbie* v. *Collins,* 342 U. S. 519. If that had been the case, could it be held that the District Court was foreclosed from going into the merits and was barred from determining whether these cases came within our decisions finding systematic discrimination against Negroes in five North Carolina trials? *Brunson* v. *North Carolina,* 333 U. S. 851.

Suppose that the District Court in these circumstances had found against *Brown* and *Speller.* What basis is there for assuming that on appeal the Court of Appeals for the Fourth Circuit, with its specialized local knowledge about such matters, would not have decided in favor of the petitioners? And what basis in reason have we for assuming, if the cases had come here with a powerful opinion from Judge Parker, let us say, finding that there was systematic discrimination, that this Court would have deemed it appropriate to review so weighty a conclusion, or, if we had taken the case, that we would have found the facts and their meaning to be different from those which the Court of Appeals for the Fourth Circuit found? Such assumptions are unwarranted, especially in light of the impressive showing by MR. JUSTICE BLACK that in fact there was unconstitutional discrimination in the make-up of the juries in these two cases where life is at stake.

I cannot protest too strongly against affirming a decision of the Court of Appeals patently based on the ground that that court was foreclosed on procedural grounds from considering the merits of constitutional claims, when we now decide that the court was wrong in believing that it was so foreclosed. The affirmance by this Court of the District Court's denial of writs of habeas corpus in these cases is all the more vulnerable in that this Court, without guidance from the Court of Appeals, proceeds to consider the merits of the constitutional claim. This Court concludes that there was not a systematic discrimination in keeping Negroes off juries. If this Court deemed it necessary to consider the merits, the merits should equally have been open to the Court of Appeals. As I have already indicated, that court is far better situated than we are to assess the circumstances of jury selection in North Carolina and to draw the appropriate inferences.

No. 20.

In this case the Court of Appeals for the Fourth Circuit also sustained the District Court in dismissing applications for writs of habeas corpus based on the claim by the two petitioners here that their convictions for murder in the North Carolina court were vitiated by disregard of rights guaranteed by the United States Constitution. But this case is unlike the *Brown* and *Speller* cases; here the Court of Appeals did not find itself foreclosed to consider the merits by deeming itself bound by an adjudication of the merits in the Supreme Court of North Carolina followed by a denial of a petition for certiorari in this Court.[1] And the Court here does not sus-

[1] Although there was such a denial in this Court, no petition for certiorari was sought from the latest of the three decisions by the North Carolina Supreme Court prior to the initiation of the habeas

tain the District Court's dismissal by contending that the North Carolina Supreme Court had already adjudicated the merits, nor does this Court pass on the merits.

This Court sustains the lower courts on the ground that the right of review on the merits was foreclosed because the petitioners lost their right of review through failure to comply with the requirements of North Carolina law for perfecting an appeal in the Supreme Court of North Carolina. *State* v. *Daniels,* 231 N. C. 17, 341, 56 S. E. 2d 2, 646; *id.,* 232 N. C. 196, 59 S. E. 2d 430.

We were given to understand on the argument that if petitioners' lawyer had mailed his "statement of case on appeal" on the 60th day and the prosecutor's office had received it on the 61st day the law of North Carolina would clearly have been complied with, but because he delivered it by hand on the 61st day all opportunities for appeal, both in the North Carolina courts and in the federal courts, are cut off although the North Carolina courts had discretion to hear this appeal. For me it is important to emphasize the fact that North Carolina does not have a fixed period for taking an appeal. The decisive question is whether a refusal to exercise a discretion which the Legislature of North Carolina has vested in its judges is an act so arbitrary and so cruel in its operation, considering that life is at stake, that in the circum-

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corpus proceedings now under review. It is not inappropriate to say that the certiorari that was denied here affords a good illustration of the reason for holding that no legal significance attaches to such a denial. It would be beyond the wit of the wisest panel of judges to determine on what ground, for what reason, the petition was denied. The papers in the case do not afford a rational foundation for saying that it was this ground rather than that. The conflicting bases for rejection not only may well have influenced different members of the Court; it is not at all unlikely that individual members of the Court did not feel it necessary to determine which of two grounds was decisive.

stances of this case it constitutes a denial of due process in its rudimentary procedural aspect.

For here we are not dealing with a frivolous or even a tenuous claim of a denial of rights guaranteed under the United States Constitution in the proceedings that led to a death sentence. It suffices to quote what was said in dissent by Circuit Judge Soper, one of the most experienced and hardheaded of federal judges:

> "There is no attempt on the part of the State of North Carolina in the pending appeal to show that there was not a gross violation of the constitutional rights of the prisoners in the trial court." *Daniels* v. *Allen,* 192 F. 2d 763, 770, 771.

And this statement was not questioned by the Court of Appeals.

The basic reason for closing both the federal and State courts to the petitioners on such serious claims and under these circumstances is the jejune abstraction that habeas corpus cannot be used for an appeal. Judge Soper dealt with the deceptiveness of this formula by quoting what Judge Learned Hand had found to be the truth in regard to this generality thirty years ago:

> "We shall not discuss at length the occasions which will justify resort to the writ, where the objection has been open on appeal. After a somewhat extensive review of the authorities twenty-four years ago, I concluded that the law was in great confusion; and the decisions since then have scarcely tended to sharpen the lines. We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice." *Kulick* v. *Kennedy,* 157 F. 2d 811, 813.

The reasons for finding that we have here so complete a miscarriage of justice are so powerfully stated by Judge Soper that I cannot do better than to adopt them as my own:

> "The [trial] court's strict application of the procedural rules in a capital case in these two instances [of rulings by that court preventing defendants' attorneys from raising the jury question] can hardly be approved as a proper exercise of judicial discretion. The defendants merely asked for rulings which would have enabled them to obtain a review by the highest court of the state of the trial court's action on a grave constitutional question; and the relief could have been granted without interfering with the enforcement of the criminal laws of the state. It can hardly be doubted that the decision in each case lay within the discretion of the judge, but once it was taken, the Supreme Court of the state deemed itself powerless to interfere. Thus there is presented an impasse which can be surmounted only by a proceeding like that before this court. We have been told time and again that legalistic requirements should be disregarded in examining applications for the writ of habeas corpus and the rules have been relaxed in cases when the trial court has acted under duress or perjured testimony has been knowingly used by the prosecution, or a plea of guilty has been obtained by trick, or the defendant has been inadequately represented by counsel.[2] Hawk v. Olson, 326 U. S. 271 . . .;

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[2] This language is of course not to be read to mean that constitutional rights may not be freely waived. Under appropriate circumstances, conscious failure to appeal may constitute such waiver; the very question here is whether there has been a failure to appeal.

Darr v. Bu[r]ford, 339 U. S. 200, 203 . . . . It is difficult to see any material distinction in practical effect between these circumstances and the plight of the prisoners in the pending case who have been caught in the technicalities of local procedure and in consequence have been denied their constitutional right." 192 F. 2d, at 773.

Syllabus.

UNITED STATES EX REL. SMITH *v.* BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 31. Argued April 29–30, 1952.—Reargued October 13–14, 1952.—Decided February 9, 1953.

1. A denial of certiorari by this Court (with no statement of reasons therefor) to review a decision of a state supreme court affirming a conviction in a criminal prosecution should be given no weight in subsequent habeas corpus proceedings in a federal court. *Brown* v. *Allen, ante,* p. 443. P. 565.
2. Petitioner, sentenced to death by a state court for murder, was not denied due process in violation of the Fourteenth Amendment by virtue of his having been allowed to plead guilty without there first having been a formal adjudication of his sanity, in view of the procedure available for subsequently withdrawing the plea of guilty and entering a plea of "not guilty because of insanity." Pp. 565–567.
3. Petitioner was not denied due process by reason of his having been summarily advised by court-designated counsel at his arraignment to plead "not guilty," since there was ample opportunity later to rectify the error, if there was error, by a hearing on insanity. Pp. 567–568.
4. It was not the constitutional duty of the State, even upon request, to appoint a psychiatrist to make a pretrial examination into petitioner's sanity. P. 568.
5. Petitioner's contention that an insane man may not be executed assumes erroneously that he has been found to be insane. The law of Pennsylvania, as announced by the State Supreme Court, protects against execution of the insane. Pp. 568–569.
6. Upon the record in this case, the Federal District Court, on petitioner's application for habeas corpus, did not err in refusing to hold a plenary hearing for the determination of petitioner's sanity. Pp. 569–570.

7. As the state trial and appellate court records which were before the District Court show a judicial hearing, where on the plea of guilty the question of sanity at the time of the commission of the crime was canvassed, petitioner's sentence does not violate due process. P. 570.

192 F. 2d 540, affirmed.

Petitioner, a state prisoner, applied to the District Court for habeas corpus; and his application was dismissed. 96 F. Supp. 100. The Court of Appeals affirmed. 192 F. 2d 540. This Court granted certiorari. 343 U. S. 903. *Affirmed,* p. 570.

Thomas D. McBride argued the cause for petitioner. With him on the brief was *Herbert S. Levin.*

Randolph C. Ryder, Deputy Attorney General of Pennsylvania, argued the cause for respondent. With him on the brief were *Robert E. Woodside,* Attorney General, and *Frank P. Lawley, Jr.,* Assistant Attorney General.

Richardson Dilworth, District Attorney for the County of Philadelphia, filed a brief for the City and County of Philadelphia, urging that the judgment be reversed and the cause remanded.

Mr. Justice Reed delivered the opinion of the Court.

Petitioner was convicted of murder and sentenced to death by the State of Pennsylvania. The crime was committed in January 1948. Petitioner was without counsel when he appeared for arraignment on February 25, 1948. The presiding judge asked a lawyer present in the courtroom to advise petitioner how to plead. This lawyer, who knew nothing about petitioner, advised him to enter a plea of "not guilty." On September 21, 1948, after several continuances, the District Attorney, to-

gether with petitioner's state-named counsel, who had been appointed after arraignment, and a judge of the sentencing court, agreed that a plea of "guilty" would be substituted for the earlier plea of "not guilty." This was done so that the State could present its evidence that the crime was first degree murder, and petitioner's counsel would then have additional time in which to procure out-of-state evidence at State expense to support the contention that petitioner was insane. The State put in its evidence on September 21, 1948. At hearings held on October 28, 1948, and November 5, 1948, defense counsel introduced evidence tending to show that petitioner was insane. The sentencing court was not satisfied by the evidence that petitioner had been insane either at the time of the murder or at any time thereafter, and on February 4, 1949, sentenced him to death.

While the docket entries as shown in the trial record differ from the notes on the indictment, as to whether the sentencing court found petitioner guilty of first degree murder on September 21, 1948, or did not so find until February 4, 1949, the difference is immaterial. According to the entries written in longhand on petitioner's indictment (192 F. 2d, at 569), the entry noting the adjudication of guilty of murder in the first degree on February 4, 1949, is not in proper order. It appears to have been inserted between the entry stating that petitioner had withdrawn his plea of not guilty and entered a plea of guilty on September 21, 1948, and the entry of November 5, 1948, stating that "additional testimony [had been] heard and held under advisement." If the contested and out-of-order date of "2/4/49" is removed, the notes on the indictment would agree with the docket entry of September 21, 1948, and would read "[A]fter hearing testimony both for the Commonwealth and the defendant . . . the defendant is adjudged guilty of murder in the 1st

degree." [1] Since the entry of September 21, 1948, was made following a plea of guilty and with opportunity for further evidence as to insanity, it was not in any way binding or even persuasive. It was the sentence on February 4, 1949, after the insanity hearing that was the final adjudication.

An appeal was taken from this judgment on a full record to the State Supreme Court where it was asserted that it was an abuse of discretion by the sentencing court to have imposed the death sentence in the circumstances of the case. The conviction was affirmed. 362 Pa. 222, 66 A. 2d 764. No effort was made to secure from this Court a writ of certiorari to review that affirmance. Petitioner thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. The petition was denied on the ground that petitioner was not within the jurisdiction of the court at the time the proceeding was instituted. 87 F. Supp. 339. On appeal the denial was affirmed by the Court of Appeals for the Third Circuit. 181 F. 2d 847. No petition for certiorari to review that decision was filed with this Court. A petition for habeas corpus was then filed in the State Supreme Court. This was entertained on the merits and denied on the ground that there was no denial of due process of law and there was "nothing in this record which convinces us that this relator was insane when he committed the murder charged or when he pleaded guilty or at the time

[1] On appeal the Supreme Court of Pennsylvania stated that petitioner had been adjudged guilty of murder in the first degree on the former date, September 21, 1948. *Commonwealth* v. *Smith*, 362 Pa. 222, at 223, 66 A. 2d 764. In its opinion denying the subsequent petition for a writ of habeas corpus the Pennsylvania court held that "[w]hether this judgment was entered on September 21, 1948, or on February 4, 1949, is unimportant in these proceedings." *Commonwealth ex rel. Smith* v. *Ashe*, 364 Pa. 93, at 112, 71 A. 2d 107, at 116.

he was sentenced to death." 364 Pa. 93, at 119, 71 A. 2d 107, at 120. Immediately following our denial of a timely petition for certiorari, 340 U. S. 812, petitioner filed a second application for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. The District Court dismissed the petition, noting that all the issues presented in the petition had been before the State Supreme Court. 96 F. Supp. 100, 105. On appeal the Court of Appeals for the Third Circuit affirmed. 192 F. 2d 540. We granted certiorari, 343 U. S. 903. The petitions involved in the State habeas corpus proceedings presented the identical due process questions which are before us now, and the complete record of the State trial proceedings—appellate as well as those in State habeas corpus—were before the District Court and the Court of Appeals.

The first point we consider is the question of the effect to be given our denial of certiorari in a habeas corpus case. Both the District Court (96 F. Supp. 100, 105) and the Court of Appeals (192 F. 2d 540, 544) concluded that the denial of certiorari in habeas corpus cases means nothing except that certiorari was denied. As the effect of a denial of certiorari was then in doubt, we granted this petition primarily to determine its effect. As this conclusion is spelled out more fully in the opinions in *Brown* v. *Allen,* 344 U. S. 443, decided today, the answer is short. Our denial of certiorari in habeas corpus cases is without substantive significance.

The next contention of petitioner is that he was denied due process. In substance, this issue presents questions as to (1) whether the State should have allowed him to plead guilty without having first formally adjudicated the question of his mental competency, and (2) whether it should have permitted him to plead at all to a capital offense without affording him the technical services of a psychiatrist.

Petitioner had been committed to an institution for mental patients in New York three years prior to the commission of the crime with which he is charged. At the New York institution his disease was diagnosed as dementia praecox. After four months he was discharged as recovered. Later, he voluntarily committed himself to the Philadelphia General Hospital for fear that he might harm someone. Ten days later he was released because there was "no evidence of [his] having any psychosis." These facts were presented to the trial court prior to sentencing on February 4, 1949.

In contending that Pennsylvania denied him due process by convicting him of murder on his plea of guilty without an adjudication or evidence as to his sanity, petitioner points to language used by the State Supreme Court indicating, in his view, a holding of sanity based on the plea of guilty, instead of on evidence. There that court stated that the plea of guilty was an admission of sanity, and that the evidence of petitioner's mental condition taken by the trial court after the plea of guilty went to the question of the appropriate penalty.[2] The complete answer to petitioner's contentions, however, is found in the succeeding paragraph where the court said:

> "If the evidence taken as to the defendant's mental condition for the purpose of enabling the court to assess the proper punishment, raised a substantial doubt as to Smith's sanity, it would have been the duty of his counsel to have moved to withdraw the

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[2] "When counsel for the relator entered a plea of guilty to the indictment, that plea admitted the prisoner's sanity because no insane person can be guilty of murder. The testimony relating to Smith's mental condition, taken after the plea had been entered, was for the purpose of providing the court with data which it could use in determining the appropriate penalty to be imposed upon the defendant." 364 Pa. 93, at 112, 71 A. 2d 107, at 117.

> plea of guilty so that a plea of 'not guilty because of insanity' could be entered. If the trial court had denied this motion the defendant could have taken an exception and on appeal this Court would have decided whether or not the court in denying the motion had abused its discretion." 364 Pa. 93, at 113, 71 A. 2d 107, at 117.

Petitioner furthermore maintains that the sentence imposed violates due process because he was advised to plead "not guilty" at arraignment on the snap advice of a court-designated lawyer who had never before laid eyes on petitioner. As a consequence of this offhand plea of not guilty, petitioner contends he lost his only chance to require that his mental competency be tried at the outset by a jury.[3]

Assuming that such a chance was in fact lost, it does not follow that due process was denied. As pointed out above, the Pennsylvania Supreme Court emphasized that even after changing his plea to "guilty" on the advice of counsel familiar with this case, there was still adequate

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[3] Pennsylvania law provides that counsel may ask for a special trial to test his client's sanity at arraignment:

"The same [lunacy commitment] proceedings may be had, if any person indicted for an offense shall, upon arraignment, be found to be a lunatic, by a jury lawfully impanelled for the purpose, or if, upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be a lunatic, the court shall direct such findings to be recorded, and may proceed as aforesaid." 19 Purdon's Pa. Stat. Ann. § 1352.

Whether such a jury trial at the outset will be granted depends on the discretion of the trial judge. He may defer the inquest and allow the question to be decided by the jury trying the indictment. *Webber* v. *Commonwealth,* 119 Pa. 223, 13 A. 427; *Commonwealth* v. *Scovern,* 292 Pa. 26, 140 A. 611; *Commonwealth* v. *Cilione,* 293 Pa. 208, 142 A. 216; *Commonwealth* v. *Iacobino,* 319 Pa. 65, 178 A. 823.

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opportunity to withdraw the second plea and substitute a plea of "not guilty because of insanity" had petitioner's counsel entertained any doubt of his client's mental competency. 364 Pa., at 113, 71 A. 2d, at 117. When Pennsylvania furnished petitioner counsel for his arraignment, we cannot say his error in advising a "not guilty" plea made all future proceedings unconstitutional when there was ample opportunity to rectify the error, if any there was, by a hearing on insanity. A claim of denial of due process can hardly be predicated upon the failure of a defense move.

This brings us to petitioner's second point: That the assistance of a psychiatrist was necessary to afford him adequate counsel. The record of the trial-court proceedings reveals that on November 5, 1948, a psychiatrist, who had examined petitioner at the court's request, testified as to petitioner's sanity at the time of the trial and at the time of the commission of the crime. In addition, on October 28, 1948, two other psychiatrists were called by the defense to testify as to petitioner's mental competence. On the same day, petitioner's counsel also introduced various reports and letters dealing with his client's mental history. On this evidence the court determined his sanity. Petitioner further asserts that he should have been given technical pretrial assistance by the State. Although the trial judge testified that defense counsel made no such request, petitioner here states that the trial court refused to appoint a psychiatrist to make a pretrial examination. We cannot say that the State has that duty by constitutional mandate. See *McGarty* v. *O'Brien,* 188 F. 2d 151, 155. As we have shown, the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices.

Petitioner's argument that an insane man may not be executed proceeds on the assumption that he has been found to be insane. The law of Pennsylvania, as an-

nounced by the Supreme Court of the State, provides full protection against the execution of the insane.

> "It is a principle imbedded in the common law—and we administer the common law in Pennsylvania—that no insane person can be tried, sentenced or executed.
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> . . . . . .
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> "A prisoner convicted of murder and under sentence of death is (like the relator in the instant case) still in *the hands of the law* and in a proper case the judiciary of the State can intervene by appropriate means to save an insane prisoner from execution. The judiciary has this power both under the statutes and under the common law." *Commonwealth ex rel. Smith* v. *Ashe,* 364 Pa. 93, 116–119, 71 A. 2d 107, 118–120. See *Phyle* v. *Duffy,* 334 U. S. 431; and *Solesbee* v. *Balkcom,* 339 U. S. 9.

Petitioner's final point is that the United States District Court committed error in refusing to hold a plenary hearing for determination of his sanity. This is refuted by *Brown* v. *Allen,* 344 U. S. 443, at 460–465, decided today.

In denying the first petition, the District Court received evidence from judges of the State trial panel, defense and prosecution counsel and others as to whether a fair hearing on petitioner's sanity had been accorded him by the State. In denying the second petition for habeas corpus, the District Court held that not "unless special circumstances prevail, should the lowest federal court reverse the highest state court in cases where the constitutional issues have been disposed on the merits by the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the state court and the allegations in the petition for the writ before

the federal court fail to disclose that the state in its prosecution departed from the constitutional requirements. That is this case." *United States ex rel. Smith* v. *Baldi,* 96 F. Supp. 100, at 103.

This view of the proceedings accords with our holding in the *Brown* case, *supra.* As the trial and appellate State court records which were before the District Court show a judicial hearing, where on the plea of guilty the question of sanity at the time of the commission of the crime was canvassed, the sentence does not violate due process.

Affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.*

Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder. But the nature and operation of the mind are so elusive to the grasp of the understanding that the basis for formulating standards of criminal responsibility and the means for determining whether those standards are satisfied in a particular case have greatly troubled law and medicine for more than a century. See Glueck, Mental Disorder and The Criminal Law (1925); Abrahamsen, Crime and the Human Mind (1944); Overholser, The Psychiatrist and the Law (to be published in April 1953 by Harcourt Brace & Co.) (particularly Chapter II). To this day, conflict and controversy regarding these problems bedevil the administration of criminal justice. See, *e. g., Fisher* v. *United States,* 328 U. S. 463. The deep concern engendered in England just the other day by the case of John Thomas Straffen strikingly disclosed

*[See also opinion of MR. JUSTICE FRANKFURTER in *Brown* v. *Allen, ante,* p. 488, which also applies to this case.]

the unsatisfactory state of the law. See *The Times,* July 22, 1952, p. 3; July 23, 1952, p. 4; July 24, 1952, p. 3; July 25, 1952, p. 3; July 26, 1952, p. 7; August 30, 1952, pp. 2, 5; September 1, 1952, p. 5; September 4, 1952, p. 5; September 12, 1952, p. 7; *The Economist,* August 30, 1952, p. 494; and *The Lancet,* August 2, 1952, p. 239. (Especially comments subsequent to the action of the Home Secretary, which followed dismissal of Straffen's appeal by the Court of Criminal Appeal in *Regina* v. *Straffen,* [1952] 2 Q. B. 911.)

The law of Pennsylvania in the abstract on this controversial subject is clear and unassailable. "It is a principle embedded in the common law—and we administer the common law in Pennsylvania—that no insane person can be tried, sentenced or executed." *Commonwealth ex rel. Smith* v. *Ashe,* 364 Pa. 93, 116, 71 A. 2d 107, 118. In view of the fallibilities of human judgment regarding the same body of evidence, it is inevitable that one may be doubtful, and even more than doubtful, whether in a particular case a plea of insanity was properly rejected. It is not for this Court to find a want of due process in a conviction for murder sustained by the highest court of the State merely because a finding that the defendant is sane may raise the gravest doubts. But it is our duty under the Fourteenth Amendment to scrutinize the procedure by which the plea of insanity failed and defendant's life became forfeit. A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguard of due process in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment.

One has only to read the opinions both of the four Judges who constituted the majority of the Court of Appeals and of the three dissenters to appreciate the tangled skein of procedural complexities in which the defendant in this case was hopelessly caught. 192 F. 2d

540. And I cannot read the opinion of Chief Judge Biggs, *id.*, at 549, without being left with such an unrelievable feeling of disquietude as amounts to a conviction that the accused in this case was deprived of a fair opportunity to establish his insanity. And this not the less so because the deprivation resulted from the tangled web that was woven for the defendant, even if unwittingly, by the courts of Pennsylvania.

But I am of the view that there is another reason, which in itself is for me conclusive, why this Court should not affirm the judgment below. It is that a new decisive factor, which was introduced for the first time here, requires reconsideration of the disposition below. After the case left the Court of Appeals it came to the knowledge of petitioner's counsel that the court-appointed expert, the professional witness on the issue of insanity on whose testimony the Pennsylvania courts relied, had himself been committed, as of January 12, 1952, because of an incurable mental disease which had deprived him of "any judgment or insight." This fact was brought to the notice of this Court in an affidavit not challenged by the respondent, which also averred that "this intellectual deterioration was evidenced even on a clinical level in January, 1951." The expert's report on Smith's sanity was made to the sentencing court on November 5, 1948. His disability was not known either to the District Court or the Court of Appeals in February and October, 1951, when they respectively ruled against the petitioner. Even uninformed judges may know that this kind of mental illness does not set in overnight but is the culmination of a long process. Indeed, the medical history, sketchy as it is, revealed by the affidavit filed here demonstrates the gradual manner in which the mental illness in question developed. The extent to which this affidavit vitiates the worth of the expert testimony taken by the sentencing court should not be made a mat-

ter of judicial notice. But to allow the victim of this testimony, which, in any event, has been brought into doubt, to go to his death without an opportunity for reassessment, by either State or federal court, of the basis for the rejection of his plea of insanity would constitute a denial of due process no less gross than if the sentence had been imposed without any hearing at all on the issue of sanity.

I need hardly point out that in a court of equity causes are disposed of on the facts as they appear at the time of the disposition, and that habeas corpus is certainly to be governed by the rules of fairness enforced in equity. The cause should, therefore, be remanded to the District Court for disposition of the new matter revealed in the affidavit filed here.

The Court does not reach this issue. Therefore I do not now decide whether this evidence raises a new ground which must first, under principles of exhaustion, be presented in the State courts or whether the federal court may properly view it simply as new evidence bearing on a claim already exhausted—that the determination of sanity was inadequate.

CITY OF CHICAGO *v.* WILLETT COMPANY.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 23. Argued October 17, 1952.—Decided February 9, 1953.

Respondent is an Illinois corporation with its place of business in Chicago. It owns a fleet of trucks which it uses to transport goods for hire within Chicago as well as between Chicago and points in neighboring States. Every day each truck carries some goods which never leave the City and some destined for neighboring States. *Held:* As applied to respondent, an ordinance of the City of Chicago levying an annual license tax ranging, according to capacity, from $8.25 to $16.50 on each truck operated for hire "within the city" is not inconsistent with the Commerce Clause when not shown to be in fact a burden on interstate commerce. Pp. 574–580.

409 Ill. 480, 101 N. E. 2d 205, reversed.

The Supreme Court of Illinois held an ordinance of the City of Chicago levying an annual license tax on trucks operated for hire within the City unconstitutional as applied to respondent's trucks. 409 Ill. 480, 101 N. E. 2d 205. This Court granted certiorari. 343 U. S. 940. *Reversed and remanded,* p. 580.

Arthur Magid argued the cause for petitioner. With him on the brief were *John J. Mortimer* and *L. Louis Karton.*

Charles Dana Snewind argued the cause for respondent. With him on the brief were *William J. Lunch* and *George J. Schaller.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Once more we are called upon to pass on the validity of a tax which falls in some measure upon commerce "among the several States." In the situation before us,

it is not a tax imposed on interstate commerce as such. It is a tax intended to fall on business done "within the city" that levies it, although in part it is imposed on carriers of intrastate and interstate commerce inseparably commingled. The tax is on trucks and is levied by an ordinance of the City of Chicago, of which the relevant portions are set out in the margin.[1] It is graduated according to size, ranging from $8.25 on a truck of no more than two-ton capacity to $16.50 on a truck of more than four-ton capacity. Penalties are provided for failure to pay the tax.

Respondent is an Illinois corporation and has its place of business in Chicago. It owns a fleet of trucks which it employs to transport goods within Chicago, between Chicago and other points in Illinois, and between Chicago, and other points in Illinois, and points in Indiana

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[1] "Every . . . truck . . . which shall be operated . . . for the purpose of transporting . . . goods . . . within the city for hire or reward, shall be deemed a cart . . . .

"Any person engaged in the business of operating a cart shall be deemed a carter.

"An annual license tax is imposed upon every carter for each cart operated or controlled by him, according to the following schedule:

. . . . .

"Automotive vehicles—

Capacity not exceeding two tons	$8.25
Capacity exceeding two but not exceeding three tons	11.00
Capacity exceeding three but not exceeding four tons	13.20
Capacity exceeding four tons	16.50

. . . . .

"It shall be unlawful for any person to engage in the business of a carter without first having paid such license tax.

. . . . .

"Any person violating any of the provisions of this chapter shall be fined . . . ." Municipal Code of Chicago, c. 163, Journal of the Proceedings of the City Council of the City of Chicago, Illinois, January 14, 1949, p. 3679.

and Wisconsin. It is stipulated that each of respondent's vehicles "during every single day of the year carries on it along with property which never leaves the city . . . property destined to some point outside the State of Illinois."

Upon respondent's failure to pay the tax the present proceedings were instituted by the City of Chicago in its Municipal Court. The verdict having gone against the City, the Supreme Court of Illinois, on appeal, affirmed the judgment of acquittal, holding that respondent was "not subject to the license tax" because it "cannot separate its loads, nor can it discontinue any part of the service." *City of Chicago* v. *Willett Co.*, 406 Ill. 286, 295, 94 N. E. 2d 195, 200.

Being left in doubt by the Illinois court's opinion whether it had held that the ordinance could not, because of the Commerce Clause, be validly applied to the respondent's situation or had construed the ordinance so as not to cover a situation like respondent's, we granted certiorari and remanded for clarification. 341 U. S. 913. A restatement of its holding left us in no doubt that the Supreme Court of Illinois did not rest its affirmance on a restrictive construction of the ordinance, excluding respondent from its scope, but found that as applied to respondent the ordinance runs afoul of the Commerce Clause. *City of Chicago* v. *Willett Co.*, 409 Ill. 480, 101 N. E. 2d 205. We granted certiorari to review this judgment because it raises questions of importance to the Nation's major transportation centers. 343 U. S. 940.

"It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected." *Galveston, Harrisburg & San Antonio R. Co.* v. *Texas*, 210 U. S. 217, 225. This case does not raise the difficulties so often encountered

when determination of the validity of State action affecting interstate commerce requires an accommodation between a State's undoubted power over its own internal commerce and the national interest in the unrestricted flow of interstate commerce. This tax, as it falls on respondent, an Illinois corporation having its place of business in Chicago, is clearly unassailable under the authority of *New York Central R. Co.* v. *Miller,* 202 U. S. 584, which we reaffirmed in *Northwest Airlines, Inc.* v. *Minnesota,* 322 U. S. 292. However, "nice distinctions" have been argued to us and they should be considered.

It is said on the one hand that *Osborne* v. *Florida,* 164 U. S. 650, *Pullman Co.* v. *Adams,* 189 U. S. 420, and *Pacific Telephone Co.* v. *Tax Commission,* 297 U. S. 403, decide this case, and on the other that it is controlled by cases such as *Adams Express Co.* v. *New York,* 232 U. S. 14, *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, *Sprout* v. *South Bend,* 277 U. S. 163, and *Cooney* v. *Mountain States Telephone Co.,* 294 U. S. 384. As was true in *Pacific Telephone Co.* v. *Tax Commission, supra,* the taxpayer's principal argument in this case has been that the tax is necessarily void because the taxpayer is not free to withdraw from the local business, which alone the statute purports to tax, without discontinuing its interstate business as well. Respondent relies heavily on *Sprout* v. *South Bend, supra.* But Mr. Justice Brandeis, who wrote for the Court in *Sprout,* pointed out in the *Pacific Telephone* case that in *Sprout* the taxpayer could not avoid the tax by restricting himself to interstate business only and withdrawing from local business, because the tax, by its terms, fell on exclusively interstate, as well as intrastate, business conducted from the City of South Bend. 297 U. S., at 416–417. That was the controlling fact in *Sprout,* which was absent in the *Pacific Telephone*

case, and is absent in this case also, since the Illinois Supreme Court has told us that the Chicago ordinance is not to be read as imposing a tax on trucks which do not carry goods within the City. *City of Chicago* v. *Willett Co., supra,* 406 Ill., at 289–290, 94 N. E. 2d, at 197–198. Thus, as regards the main point pressed by respondent, the Chicago tax avoids the infirmity laid bare by the *Sprout* case, and meets the facts of *Osborne* v. *Florida, supra,* and *Pullman Co.* v. *Adams, supra,* as did the *Pacific Telephone* case. Again, as in *Pacific Telephone,* the taxpayer here makes no showing that the tax, though directed at intrastate business only, in fact burdens interstate commerce. This is for the taxpayer to show affirmatively and respondent has made no attempt to do so.

But, if it were necessary to decide upon the basis of the "nice distinctions" urged upon us, we could not rest without more on the authority of *Pacific Telephone.* For the tax in that case was measured by a percentage of the gross income drawn solely from intrastate business. Although the taxpayer's intrastate and interstate activities were inseparable, the tax was not laid inseparably on both. 297 U. S., at 414. That is not true in this case. Here the tax falls inseparably on what have been called instrumentalities of interstate commerce, which are at once also those of intrastate commerce. Whatever intrinsic significance this difference may have in other situations, it becomes irrelevant in a case controlled, as is this one, by the governing principles of *New York Central R. Co.* v. *Miller, supra.*[2]

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[2] The *Miller* case was not considered by the Court in *Adams Express Co.* v. *New York, supra; Bowman* v. *Continental Oil Co., supra; Cooney* v. *Mountain States Telephone Co., supra;* or *Sprout* v. *South Bend, supra.* It was inapplicable to the facts of the first three cases. In *Adams Express,* circumstances surrounding the im-

In the *Miller* case, the taxpayer, a railroad company, was "a New York corporation owning or hiring lines without as well as within the State . . . and sending its cars to points without as well as within the State, and over other lines as well as its own." 202 U. S., at 593. The cars were often not in the company's possession for some time. The State of New York levied a tax computed on the basis of the amount of the capital stock employed within the State. The Court held that the railroad's property could constitutionally be subjected to this tax by New York, as that State was its permanent situs, "notwithstanding its occasional excursions to foreign parts." 202 U. S., at 597; see *Northwest Airlines* v. *Minnesota, supra,* 322 U. S., at 299, n. 4. In the *Northwest Airlines* case, the taxpayer, a Minnesota corporation, used St. Paul as the home port for all its planes. The rebuilding and overhauling of planes was done in St. Paul. Minnesota assessed a tax against the airline on the basis of the entire fleet coming into the State. We held, on the authority of the *Miller* case, that "[t]he benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul . . . . The relation between

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position and enforcement of the tax indicated an attempt to exert control over interstate commerce for reasons and purposes not sanctioned by the Commerce Clause. In the *Bowman* case the taxpayer was a foreign corporation. In *Cooney* this fact is recited by the Court. In *Sprout,* however, the taxpayer was a resident, and it would appear that South Bend was his place of business. The *Sprout* case rests, as is true of all decisions in this field, on the precise facts surrounding the challenged tax—its scope, its relation to the taxing scheme of State or City, its amount, its practical consequences, and other relevant factors.

Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted." 322 U. S., at 294. And the two concurring opinions in the *Northwest Airlines* case harmonize with the result we reach here. Indeed, the "home port" theory favored by MR. JUSTICE JACKSON, 322 U. S., at 306, fits a fleet of trucks at least as well as it does a fleet of airliners.

The central and decisive fact in this case is that respondent's business has, as much as any transportation business can have, a home. That home is Chicago. To the extent that respondent's business is not confined within the City's limits, it revolves around the City. It is fed by terminals for rail and sea transportation which the City provides. It receives, much more continuously than did the airline in the *Northwest Airlines* case or the railroad in the *Miller* case, the City's protection, and it benefits from the City's public services. In the circumstances, a tax of reasonable proportions such as the one in question, not shown in fact to be a burden on interstate commerce, is not inconsistent with the Commerce Clause.

The judgment of the Supreme Court of Illinois is reversed and the cause remanded to that Court for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I agree with the conclusion reached by the Court. In *Pacific Telephone & Telegraph Co.* v. *Tax Commission,* 297 U. S. 403, it was held that "No decision of this Court lends support to the proposition that an occupation

tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable." Page 415. Cf. *Sprout* v. *South Bend,* 277 U. S. 163, 171; *Pullman Co.* v. *Adams,* 189 U. S. 420.

The Chicago "carters tax" is strictly an occupational tax for carrying goods within the City. *City of Chicago* v. *Willett Co.,* 406 Ill. 286, 290, 94 N. E. 2d 195, 198. I do not think that *New York Central R. Co.* v. *Miller,* 202 U. S. 584, is a precedent to uphold such a tax as this on the ground that the taxpayer is a corporation of the taxing state and doing business in Chicago. The tax in the *Miller* case was measured by the capital employed in the state. All railroad cars of the taxpayer except those outside the state "during the whole tax year" were included in the measure. Page 595. The validity to so tax turned on the railroad's failure to show, by some form of apportionment, taxability in other states. Page 597. I find nothing in the conclusion and judgment of the Court in *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, that would make the *Miller* case applicable to this situation, even if the "conclusion" were an opinion of this Court. If I understand the Court's present opinion correctly, it decides that this occupation tax is valid merely because the taxpayer is an Illinois corporation with its business home in Chicago, the taxing body. The facts that it is an Illinois corporation and that its trucks are sometimes out of the state are not controlling. The corporation is taxable because it does intrastate business on the streets of Chicago.

Whether the tax is expressly declared to be for the use of the highways or for other state services or protection rendered interstate business is immaterial. This is a charge obviously for the use of the highways of the City by the carters and therefore valid. See *Union Broker-*

age Co. v. *Jensen,* 322 U. S. 202, 211–212; *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 153; and *Caskey Baking Co.* v. *Virginia,* 313 U. S. 117, 119.

MR. JUSTICE DOUGLAS, dissenting.

If a carrier had two trucks, one engaged exclusively in intrastate commerce and the other engaged exclusively in interstate commerce, I think this tax could not constitutionally be levied on the latter. Like the tax in *Sprout* v. *South Bend,* 277 U. S. 163, 170, it is not designed "as a measure of the cost or value of the use of the highways." As the Supreme Court of Illinois said, it is an occupational tax. 406 Ill. 286, 290, 94 N. E. 2d 195, 198. It therefore could not be exacted for the privilege of engaging in interstate commerce. *Sprout* v. *South Bend, supra,* p. 171; *Spector Motor Service* v. *O'Connor,* 340 U. S. 602.

The incidence of the tax in the present case is no different. It is a flat fee per truck. Respondent does not segregate its intrastate from its interstate business; nor is it possible for it to do so; nor could respondent continue in business if there were a segregation. 406 Ill. 286, 291–293, 94 N. E. 2d 195, 198–199. One truck often makes both intrastate and interstate deliveries. The interstate business, by increasing the number of trucks operated by respondent, therefore increases the amount of the tax. That for me is enough to establish an unconstitutional burden on interstate commerce. This case therefore is not controlled by *Pacific Tel. Co.* v. *Tax Comm'n,* 297 U. S. 403, 414, where the interstate business did not increase the amount of the tax.

The burden on commerce is as great whether the tax on the interstate carrier is imposed by the state of its incorporation or by another state. That is implicit in *Sprout* v. *South Bend, supra,* a case which it seems to me is faithful to the constitutional scheme.

Syllabus.

BODE ET AL. *v.* BARRETT, SECRETARY OF STATE, ET AL.

NO. 187. ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.*

Submitted January 5, 1953.—Decided February 9, 1953.

Appellants, most of whom are interstate carriers and all of whom are intrastate carriers in Illinois, challenged the constitutionality of an Illinois law which imposes a tax for the use of the public highways and measures the tax exclusively by the gross weight of each vehicle. None of the appellants showed that the tax bore no reasonable relation to the use he made of the highways in his intrastate operations or that the tax was increased by reason of his interstate operations. *Held:*

1. Appellants have failed to carry the burden of showing that the tax deprives them of rights which the Commerce Clause protects. Pp. 584–585.

2. The tax does not violate the Due Process Clause of the Fourteenth Amendment, though private carriers are taxed at the same rate as carriers for hire. Pp. 585–586.

3. Since no showing is made that any of the appellants is the victim of an invidious classification, the statute does not violate the Equal Protection Clause of the Fourteenth Amendment. P. 586.

4. The fact that the statute requires Illinois residents to pay the tax, whereas nonresidents are exempt if the states of their residence reciprocate and grant like exemptions to Illinois residents, does not violate the Compact Clause of Art. I, § 10 of the Constitution. P. 586.

412 Ill. 204, 106 N. E. 2d 521, and 412 Ill. 321, 106 N. E. 2d 510, affirmed.

The Supreme Court of Illinois sustained the constitutionality of a state tax on trucks. 412 Ill. 204, 321, 106 N. E. 2d 521, 510. On appeal to this Court, *affirmed,* p. 586.

Scott W. Lucas, Charles A. Thomas and *Hugh J. Graham, Jr.* submitted on brief for appellants in No. 187.

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*Together with No. 274, *Co-Ordinated Transport, Inc. et al.* v. *Barrett, Secretary of State, et al.*, argued January 5, 1953, on appeal from the same court.

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Frank R. Reid, Jr. argued the cause for appellants in No. 274. With him on the brief were *Sam Alschuler, Ralph C. Putnam, Jr.* and *William C. Murphy.*

Ivan A. Elliott, Attorney General of Illinois, and *John T. Chadwell, Frank M. Pfeifer* and *Richard M. Keck,* Special Assistant Attorneys General, submitted on brief for appellees in No. 187.

Mr. Chadwell argued the cause for appellees in No. 274. With him on the brief were *Mr. Elliott, Mr. Pfeifer* and *Mr. Keck.*

Mr. Justice Douglas delivered the opinion of the Court.

These cases challenge the constitutionality of §§ 9, 11, and 20 of the Illinois Motor Vehicle Law, as amended. Ill. Rev. Stat., 1951, c. 95½. The statute imposes a tax for the use of the public highways and measures the tax exclusively by gross weight of the vehicle. Appellants, most of whom are interstate carriers, challenged the tax as violating the Commerce Clause (Art. I, § 8) of the Constitution and the Due Process Clause of the Fourteenth Amendment. The Supreme Court of Illinois sustained the statute. 412 Ill. 204, 321, 106 N. E. 2d 521, 510. The cases are here by appeal. 28 U. S. C. § 1257 (2).

The main emphasis of the argument is on the Commerce Clause. The argument starts from the premise found in our opinions that a state may levy a tax on an interstate motor vehicle that is "measured by or has some fair relationship to the use of the highways for which the charge is made." *McCarroll* v. *Dixie Lines,* 309 U. S. 176, 181. It is contended that the present tax is not so measured but has the same infirmities as the tax on motor vehicles which the Court invalidated in *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183. An elaborate argument is advanced to the effect that a large fraction of the costs of installing and maintaining highways has

no relation to the weight of the vehicles that pass over them. Therefore, a tax such as this one, which is determined solely with reference to weight, is a tax part of which is exacted for a purpose other than the use of the highways.

We do not stop to analyze the evidence tendered by appellants. For we do not reach the issue in this case. It is true that some of the appellants are interstate carriers. But it is also true that each of the interstate carriers does an intrastate business as well. The tax is required from any motor vehicle that moves on the highways. It is, indeed, a tax for the privilege of using the highways of Illinois. Clearly it is within the police power of Illinois to exact such a tax at least from intrastate operators. *Hendrick* v. *Maryland,* 235 U. S. 610. No showing has been made by any of the appellants that the tax bears no reasonable relation to the use he makes of the highways in his intrastate operations. No effort is made to show that in that way or in some other manner the tax is increased by reason of the interstate operations of any appellant. In short appellants have failed to carry the burden of showing that the tax deprives them of rights which the Commerce Clause protects. Cf. *Southern R. Co.* v. *King,* 217 U. S. 524, 534. The case is therefore to be distinguished from those situations where by nature of the tax or its incidence (*Sprout* v. *South Bend,* 277 U. S. 163, 170, 171; *Spector Motor Service* v. *O'Connor,* 340 U. S. 602, 609) an issue of unreasonable burden on interstate commerce is presented.

The objections under the Due Process Clause of the Fourteenth Amendment are without substance. The power of a state to tax, basic to its sovereignty, is limited only if in substance and effect it is the exertion of a different and a forbidden power (*Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44), as for example the taxation of a privilege protected by the First Amendment. See *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112. No such problem is

even remotely involved here. Complaint is made that private carriers are taxed at the same rate as carriers for hire. Yet so far as the Fourteenth Amendment is concerned, that objection is frivolous, since neither private nor public carriers have the right to use the highways without payment of a fee (see *Hendrick* v. *Maryland, supra*); and we cannot say that the exaction of the same fee from each is out of bounds. Appellants make other arguments to the effect that the statute is so inconsistent, vague, and uncertain in its classification as to violate the Equal Protection Clause of the Fourteenth Amendment. But even if we assume that the vagaries of the law reach that dignity, no showing is made that any of the appellants is the victim of an invidious classification. Cf. *Stephenson* v. *Binford,* 287 U. S. 251, 277.

We need notice only one other argument and that is that the statute requires Illinois residents to pay the tax, whereas nonresidents are exempted provided the states of their residence reciprocate and grant like exemptions to Illinois residents. That objection, so far as the Fourteenth Amendment is concerned, was adequately answered in *Storaasli* v. *Minnesota,* 283 U. S. 57, 62. And contrary to appellants' suggestions, that kind of reciprocal arrangement between states has never been thought to violate the Compact Clause of Art. I, § 10 of the Constitution. See *St. Louis & S. F. R. Co.* v. *James,* 161 U. S. 545, 562; *Kane* v. *New Jersey,* 242 U. S. 160, 168.

Affirmed.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE CLARK took no part in the consideration or decision of these cases.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, dissenting.

The problem of this case is not met by asserting that a tax ranging as high as $1,580 per truck does not pre-

sent an issue under the Commerce Clause because the carriers do intrastate as well as interstate business and the tax, therefore, does not as a matter of law affect commerce among the States. (The Court apparently deems the size of the tax immaterial since it does not mention the amounts involved.) It has been suggested in a cognate situation, though one involving a comparatively trifling exaction, that interstate commerce is unconstitutionally burdened solely because the taxpayer's interstate business increases the number of trucks on which the tax is levied and hence the total amount due from him. One does not have to embrace this suggestion to find the Court's position in this case unsupportable. For the Court declares appellants' claim under the Commerce Clause baseless although it does not "stop to analyze the evidence tendered by appellants."

The Court disposes of the contention that the judgments below offend the Commerce Clause, by concluding that it need not "reach the issue in this case." Its reasoning is as follows: all the interstate carriers here are engaged in intrastate commerce as well; were they not engaged in interstate commerce at all, they could be taxed on account of their intrastate operations; since none of the appellants thus pays an additional tax for its interstate operations, none is in a position to claim the protection of the Commerce Clause. Consideration of a challenge to a tax under the Due Process Clause, which the Court does undertake (reaching conclusions I agree with), does not, of course, bar appellants from challenging the tax under the Commerce Clause. Hence the Court's refusal, on the ground that it does "not reach the issue," "to analyze the evidence" on which the Commerce Clause contention rests can only mean that the Court finds that appellants had no standing to sue under the Commerce Clause, albeit the formal phrase is withheld.

For this truly startling conclusion we are vouchsafed no authority except: "Cf. *Southern R. Co.* v. *King,* 217 U. S. 524, 534." On its facts the *King* case has nothing whatever to do with the problem before us. The passage to which the citation refers simply repeats the self-evident proposition that only one whose alleged constitutional rights are affected by a State statute can assail it. But whether appellants are so affected is the very question at the threshold of the constitutional issue: is the tax forbidden by the Commerce Clause. Being engaged in interstate commerce, appellants invoke the Commerce Clause against an Illinois statute which affects them because it taxes them. Whether or not the effect on them is unconstitutional is the question which, in compliance with settled procedural rules, they have brought here on appeal.

If it is indeed true, as the Court holds, that one who is engaged both in intrastate and interstate commerce has no standing to challenge a tax such as this under the Commerce Clause because the State might, perchance, extract the same dollars and cents from him even if he engaged in intrastate commerce alone, then this Court has long been entertaining, ignorantly and wastefully, cases which it had no power to hear.

The taxation and licensing by the States of commingled, though not necessarily inextricably commingled, intrastate and interstate business, or of the instrumentalities of such commingled business, have again and again been considered here to determine whether such an assertion of the taxing power by the States had, in its practical incidence, cast an inadmissible burden upon the interstate aspect of the joint enterprise. Can it be that all these cases could quickly and easily have been disposed of by suggesting that the taxpayer could in any event have been taxed on his intrastate operations?

As far back as 1888, in *Leloup* v. *Port of Mobile,* 127 U. S. 640, the Court struck down because of the Commerce Clause a tax attacked by a taxpayer doing both intrastate and interstate business. In a hundred-odd cases since, a claim under the Commerce Clause in similar situations was considered. (This does not mean it always prevailed.) Can it be that all our predecessors bothered their heads needlessly? Indeed, ever since *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, and *Pullman Co.* v. *Kansas,* 216 U. S. 56, it has been settled that a State may not exclude a foreign corporation from doing merely local business if such exclusion would "unreasonably burden" the nonexcludable interstate business. (I am not now concerned with what is and what is not such an "unreasonable burden.") Under today's holding, was there standing in these cases?

A word on the merits. Of course a State may tax for the use of its roads by carriers engaged in interstate commerce, whether they carry local goods as well or do an exclusive interstate business. But this states the beginning of a problem in constitutional law; it does not give the answer. The real question is how the State makes the exaction—that is, what is the nature of the exaction, its basis and its practical operation. As the Court does not reach this question, it would serve no purpose for me to do so.

KWONG HAI CHEW *v.* COLDING ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 17. Argued October 17, 1952.—Decided February 9, 1953.

1. Under 8 CFR § 175.57 (b), a regulation pertaining to the entry of aliens into the United States, the Attorney General has no authority to deny to an alien who is a lawful permanent resident of the United States, and who is continuously residing and physically present therein, an opportunity to be heard in opposition to an order for his "permanent exclusion" and consequent deportation, even when the Attorney General determines that the order is based on information of a confidential nature the disclosure of which would be prejudicial to the public interest. Pp. 591–600.

   (a) *Knauff* v. *Shaughnessy*, 338 U. S. 537, distinguished. Page 596.

   (b) The term "excludable," in § 175.57 (b), is inapplicable to aliens who are lawful permanent residents physically present within the United States. P. 599.

   (c) Nothing in the statute or the Presidential Proclamations under which this regulation was issued requires or permits a broader interpretation of this section. Pp. 599–600.

2. Petitioner is an alien and a lawful permanent resident of the United States, who currently maintains his residence in the United States and usually is physically present there. While returning from a voyage to foreign ports as a seaman on a vessel of American registry with its home port in the United States, he was detained on board by an order of the Attorney General and ordered "temporarily excluded" from the United States under 8 CFR § 175.57, as an alien whose entry was deemed prejudicial to the public interest. He was denied a hearing by the Attorney General, on the ground that the order was based on information of a confidential nature the disclosure of which would be prejudicial to the public interest; and he was ordered to be permanently excluded from the United States. *Held:* Petitioner's detention, without notice of any charges against him and without opportunity to be heard in opposition to them, was not authorized by 8 CFR § 175.57 (b). Pp. 600–603.

192 F. 2d 1009, reversed.

Petitioner's application for a writ of habeas corpus was dismissed by the District Court. 97 F. Supp. 592. The Court of Appeals affirmed. 192 F. 2d 1009. This Court granted certiorari. 343 U. S. 933. *Reversed and remanded,* p. 603.

Carl S. Stern argued the cause for petitioner. With him on the brief was *Blanch Freeman.*

John F. Davis argued the cause for respondents. With him on a brief for Shaughnessy, respondent, were *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Murry Lee Randall.*

MR. JUSTICE BURTON delivered the opinion of the Court.

A preliminary consideration that is helpful to the solution of this litigation is whether, under 8 CFR § 175.57 (b),[1] the Attorney General has authority to deny to a lawful permanent resident of the United States,

[1] "§ 175.57 *Entry not permitted in special cases.* . . .

"(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

The categories set forth in § 175.53 as a basis for exclusion are those defined "to be prejudicial to the public interest." They include, for example, membership in "a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest . . ." or being "engaged in organizing, teaching, advo-

who is an alien continuously residing and physically present therein, the opportunity to be heard in opposition to an order for his "permanent exclusion" and consequent deportation, provided the Attorney General determines that the order is based on information of a confidential nature, the disclosure of which would be prejudicial to the public interest. Assuming, as seems to be clear, that the Attorney General does not have such authority, the critical issue then presented is whether he has that authority under the following additional circumstances: the resident alien is a seaman, he currently maintains his residence in the United States and usually is physically present there, however, he is returning from a voyage as a seaman on a vessel of American registry with its home port in the United States, that voyage has included scheduled calls at foreign ports in the Far East, and he is detained on board by order of the Attorney General. For the reasons hereafter stated, we hold that these additional circumstances do not change the result and that the Attorney General does not have the authority suggested.

Petitioner, Kwong Hai Chew, is a Chinese seaman last admitted to the United States in 1945. Thereafter, he married a native American and bought the home in which they reside in New York. Having proved his good moral character for the preceding five years, petitioner secured suspension of his deportation. In 1949, he was admitted to permanent residence in the United

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cating, or directing any rebellion, insurrection, or violent uprising against the United States." 8 CFR.

For statutory language similar to that in 8 CFR § 175.57, see § 5 of the Act of October 16, 1918, as amended by the Subversive Activities Control Act of 1950, 64 Stat. 1008, 8 U. S. C. (Supp. V) § 137–4, referring to aliens who are "excludable" under § 137. The Government, in the instant case, relies upon 8 CFR § 175.57, rather than upon 8 U. S. C. (Supp. V) § 137–4.

States as of January 10, 1945.[2] In World War II, he served with credit in the United States Merchant Marine. He never has had any difficulty with governmental authorities. In April, 1950, he filed a petition for natural-

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[2] "*Resolved by the Senate (the House of Representatives concurring)*, That the Congress favors the suspension of deportation in the case of each alien hereinafter named, in which case the Attorney General has suspended deportation for more than six months.

. . . . . .

"A–6665545, Chew, Kwong Hai, or Harry Kwong (Hai Chew).

. . . . . .

"Agreed to July 20, 1949." 63 Stat. 1240, 1242.

For the effect of the above action, see § 19 (c) of the Immigration Act of February 5, 1917, as amended, 62 Stat. 1206, 8 U. S. C. (Supp. V) § 155 (c):

"(c) In the case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. . . . If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. . . . Deportation proceedings shall not be canceled in the case of any alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays . . . a fee of $18 . . . . [In the instant case this was paid.] Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record

ization which is still pending. In November, 1950, he was screened and passed by the Coast Guard for employment as a seaman on a merchant vessel.[3] In the same month he signed articles of employment as chief steward on the S. S. *Sir John Franklin,* a vessel of American registry with its home port in New York City. The voyage was to include calls at several foreign ports in the Far East. He remained aboard the vessel on this voyage but, at San Francisco, in March, 1951, the immigration

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the alien's admission for permanent residence as of the date of his last entry into the United States . . . ."

8 CFR § 175.41 (q) states that for the purposes of §§ 175.41 to 175.62 "The term 'an alien who is a lawful permanent resident of the United States' means an alien who has been lawfully admitted into the continental United States, the Virgin Islands, Puerto Rico, or Hawaii for permanent residence therein and who has since such admission maintained his domicile in the United States: . . . ."

[3] For the nature and significance of such clearance, see Executive Order No. 10173, of October 18, 1950, especially §§ 6.10–1 to 6.10–9, now published, as amended, in 33 CFR, 1951 Cum. Pocket Supp. That order was issued pursuant to the Act of June 15, 1917, as amended by the Magnuson Act of August 9, 1950, 64 Stat. 427–428, 50 U. S. C. (Supp. V) § 191. It has now been implemented by regulations effective December 27, 1950, published, as amended, in 33 CFR, 1951 Cum. Pocket Supp., §§ 121.01–125.37. See also, *Parker* v. *Lester,* 98 F. Supp. 300, 191 F. 2d 1020.

Section 6.10–1, as it existed at the date of petitioner's clearance, provided:

"*Issuance of documents and employment of persons aboard vessels.* No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any licensed officer or certificated man be employed on a merchant vessel of the United States if the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would be inimical to the security of the United States: . . . ." 15 Fed. Reg. 7007.

Later regulations have published detailed security provisions as to who may be employed on merchant vessels of the United States of 100 gross tons and upward, whether engaged in foreign or other trade. 33 CFR, 1951 Cum. Pocket Supp., §§ 121.13–121.16.

inspector ordered him "temporarily excluded," under 8 CFR § 175.57, as an alien whose entry was deemed prejudicial to the public interest.

On the vessel's arrival in New York, March 29, petitioner's "temporary exclusion" was continued and he was not permitted to land. March 30, he sought a writ of habeas corpus from the United States District Court for the Eastern District of New York, charging that his detention was arbitrary and capricious and a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States. Purporting to act under 8 CFR § 175.57 (b), the Attorney General directed that petitioner be denied a hearing before a Board of Special Inquiry and that his "temporary exclusion be made permanent." The Attorney General continues to deny petitioner all information as to the nature and cause of any accusations against him and all opportunity to be heard in opposition to the order for his "exclusion." He is detained at Ellis Island "for safekeeping on behalf of the master of the S. S. 'Sir John Franklin.' "

The writ was issued but, after a hearing, it was dismissed by the District Court. 97 F. Supp. 592. The Court of Appeals for the Second Circuit affirmed. 192 F. 2d 1009. Both courts relied upon *Knauff* v. *Shaughnessy*, 338 U. S. 537. We granted certiorari because of the doubtful applicability of that decision and the importance of the issue in the administration of the Nation's immigration and naturalization program. 343 U. S. 933. Bail was denied by the District Court. 98 F. Supp. 717. It also was denied by the Court of Appeals, without prejudice to an application to this Court. Applications for bail are pending before the Commissioner of Immigration and Naturalization and this Court.

The issue is petitioner's detention, without notice of any charge against him and without opportunity to be heard in opposition thereto. Petitioner contends that

such detention is not authorized by 8 CFR § 175.57 (b). He contends also that, if that regulation does purport to authorize such detention, the regulation is invalid as an attempt to deprive him of his liberty without due process of law in violation of the Fifth Amendment. Agreement with petitioner's first contention makes it unnecessary to reach his second.

The case of *Knauff* v. *Shaughnessy, supra,* relied upon below, is not in point. It relates to the rights of an alien entrant and does not deal with the question of a resident alien's right to be heard. For purposes of his constitutional right to due process, we assimilate petitioner's status to that of an alien continuously residing and physically present in the United States.[4] To simplify the issue, we consider first what would have been his constitutional right to a hearing had he not undertaken his voyage to foreign ports but had remained continuously within the territorial boundaries of the United States.

1. It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.[5]

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[4] In this opinion "exclusion" means preventing someone from entering the United States who is actually outside of the United States or is treated as being so. "Expulsion" means forcing someone out of the United States who is actually within the United States or is treated as being so. "Deportation" means the moving of someone away from the United States, after his exclusion or expulsion.

[5] ". . . The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction

Although it later may be established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal.[6] Although Congress may pre-

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between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority." *Bridges* v. *Wixon,* 326 U. S. 135, 161 (concurring opinion).

"The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. . . . And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment." *Johnson* v. *Eisentrager,* 339 U. S. 763, 770–771.

The latter case also comments that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.,* at 771. That case related to nonresident enemy aliens who had never been in the United States, rather than to a lawful permanent resident in the position of petitioner. There is no lack of physical presence for jurisdictional purposes in the instant case.

[6] ". . . But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the

scribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.[7] For example, he is entitled to a fair chance to prove mistaken identity. At the present stage of the instant case, the issue is not one of exclusion, expulsion or deportation. It is one of legislative construction and of procedural due process.[8]

This being recognized, we interpret this regulation as making no attempt to question a resident alien's consti-

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prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." *The Japanese Immigrant Case,* 189 U. S. 86, 100–101.

". . . It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally." *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49–50. See also *Johnson* v. *Eisentrager, supra,* at 770–771; *Carlson* v. *Landon,* 342 U. S. 524, 538.

[7] See *Fong Yue Ting* v. *United States,* 149 U. S. 698, recognizing the right to expel and deport resident aliens. "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung* v. *McGrath, supra,* at 50; *Kwock Jan Fat* v. *White,* 253 U. S. 454, 457–458, 464.

[8] It is to be noted that the cases generally cited in this field in relation to the exclusion, expulsion or deportability of resident aliens deal only with that ultimate issue, and not with the right of the resident alien to a hearing sufficient to satisfy procedural due process. The reports show that there were hearings and that in some cases

tutional right to due process. Section 175.57 (b) uses the term "excludable" in designating the aliens to which it applies. That term relates naturally to entrant aliens and to those assimilated to their status. The regulation nowhere refers to the expulsion of aliens, which is the term that would apply naturally to aliens who are lawful permanent residents physically present within the United States. Accordingly, we find no language in the regulation that would have required its application to petitioner had he remained continuously and physically within the United States.[9] It thus seems clear that the Attorney General would not have had the authority to deny to petitioner a hearing in opposition to such an order as was here made, provided petitioner had remained within the United States.

The regulation before us was issued by the Secretary of State and concurred in by the Attorney General, pursuant to Presidential Proclamations No. 2523, 3 CFR, 1943 Cum. Supp., 270, and No. 2850, 3 CFR, 1949 Supp., 41. The latter proclamation issued August 17, 1949, also "ratified and confirmed" the regulation. Those proclamations, in turn, depend upon § 1 of the Act of May 22, 1918, 40 Stat. 559, as amended, June 21, 1941, 55 Stat.

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the Court considered whether the hearings had been fair. *E. g., United States* v. *Smith,* 289 U. S. 422, 424; *United States* v. *Corsi,* 287 U. S. 129, 131; *United States ex rel. Claussen* v. *Day,* 279 U. S. 398, 400; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, 358; *Lewis* v. *Frick,* 233 U. S. 291, 293; *Lapina* v. *Williams,* 232 U. S. 78, 83; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 729.

[9] The preceding subsection, 175.57 (a), uses the additional word "deported" but only to supplement "excluded": "Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States." 8 CFR.

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252, 22 U. S. C. § 223. It is not questioned that the regulation, as above interpreted, comes within these authorizations, or that such authorizations have been extended to include the dates material in this case. 66 Stat. 163, 333. We find nothing in the statute or the proclamations which calls for, permits or sustains a broader interpretation of 8 CFR § 175.57 (b) than we have given to it. The wording also now reflects congressional intent because substantially the same language was inserted by Congress in the Subversive Activities Control Act of 1950, 64 Stat. 1008. See note 1, *supra.*

2. Petitioner's final contention is that if an alien is a lawful permanent resident of the United States and also is a seaman who has gone outside of the United States on a vessel of American registry, with its home port in the United States, and, upon completion of such voyage, has returned on such vessel to the United States and is still on board, he is still, from a constitutional point of view, a person entitled to procedural due process under the Fifth Amendment. We do not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated.

Section 175.57 (b)'s authorization of the denial of hearings raises no constitutional conflict if limited to "excludable" aliens who are not within the protection of the Fifth Amendment. The assimilation of petitioner, for constitutional purposes, to the status of a continuous resident physically present in the United States also accords with the Nation's immigration and naturalization program. For example, for purposes of naturalization, such an assimilation was expressly prescribed in the Nationality Act of 1940:

"SEC. 307. (a) No person . . . shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years . . . .

. . . . . .

"(d) The following shall be regarded as residence within the United States within the meaning of this chapter:

. . . . . .

"(2) Continuous service by a seaman on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization." 54 Stat. 1142–1143, 8 U. S. C. § 707. See also, § 325, 54 Stat. 1150, as amended, 64 Stat. 1015, 8 U. S. C. (Supp. V) § 725.[10]

While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him. Where neither Congress, the President, the Secretary of State nor the Attorney General has inescapably said so, we are not

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[10] This provision survives in a modified form in § 330 of the Immigration and Nationality Act of 1952, 66 Stat. 251. Section 330 (b) includes a savings clause affecting those who applied for naturalization before September 23, 1950. Section 405 (a) also contains a general savings clause. 66 Stat. 280.

ready to assume that any of them has attempted to deprive such a person of a fair hearing.[11]

This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor. Before petitioner's admission to permanent residence, he was required to satisfy the Attorney General and Congress of his suitability for that status.[12] Before receiving clearance for his foreign cruise, he was screened and approved by the Coast Guard.[13] Before acceptance of his petition for naturalization, as well as before final action thereon, assurance is necessary that he is not a security risk. See 8 U. S. C., c. 11, Subchapter III—Nationality Through Naturalization, §§ 701–747, as amended.

We do not reach the issue as to what would be the constitutional status of 8 CFR § 175.57 (b) if it were interpreted as denying to petitioner all opportunity for a hearing. Also, we do not reach the issue as to what will be the authority of the Attorney General to order the deportation of petitioner after giving him reasonable notice of the charges against him and allowing him a

[11] Existing statutory and administrative provisions for "Exclusion Without Hearing" are discussed in the Report of the President's Commission on Immigration and Naturalization entitled "Whom We Shall Welcome" dated January 1, 1953, at pages 228–231. The discussion treats the provisions as applicable to entrant and reentrant aliens but does not even suggest that they are applicable to aliens lawfully admitted to permanent residence and physically present within the United States. The report discusses the harshness of the "reentry doctrine" and recommends its modification at pages 199–200. It does not, however, even suggest that the reentry doctrine attempts to limit the constitutional right to a hearing which resident aliens, in the status of petitioner, may have under the Fifth Amendment. The instances of hardship which the report cites appear to have been disclosed at hearings held on the issue of the alien's right to reenter.

[12] See note 2, *supra*.

[13] See note 3, *supra*.

hearing sufficient to meet the requirements of procedural due process.

For the reasons stated, we conclude that the detention of petitioner, without notice of the charges against him and without opportunity to be heard in opposition to them, is not authorized by 8 CFR § 175.57 (b). Accordingly, the judgment of the Court of Appeals is

Reversed and the cause remanded to the District Court.

MR. JUSTICE MINTON dissents.

LUTWAK ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 66. Argued December 8–9, 1952.—Decided February 9, 1953.

Petitioners were convicted of a conspiracy to defraud the United States by obtaining the illegal entry thereto of three aliens as spouses of honorably discharged veterans. They had conspired to have three such veterans journey to Paris, there go through marriage ceremonies with three aliens, bring them to the United States, and obtain their entry under the War Brides Act. The parties to the marriages were not to live together as husband and wife and were to take whatever legal steps were necessary to sever the legal ties; but these facts were to be concealed from the immigration authorities. *Held:*

1. For the purposes of this case, the question of the validity of the marriages is immaterial. Pp. 610–613.

2. In the circumstances of this case, the trial court did not err in permitting the "wives" to testify against their "husbands." Pp. 613–615.

3. It was not error for the trial court to admit testimony as to various *acts* of different petitioners, done after the conspiracy ended, without limiting the evidence to the particular defendant who performed the act, where the acts were relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies. Pp. 615–618.

4. On the record in this case, the admission against all of the conspirators, though not present when it was made, of a single *declaration* made after the conspiracy had ended was harmless error under Rule 52 (a) of the Federal Rules of Criminal Procedure. Pp. 618–620.

195 F. 2d 748, affirmed.

The Court of Appeals affirmed petitioners' conviction of a conspiracy to defraud the United States. 195 F. 2d 748. This Court granted certiorari. 344 U. S. 809. *Affirmed*, p. 620.

Anthony Bradley Eben argued the cause for petitioners. With him on the brief were *Richard F. Watt* and *Joseph L. Nellis.*

Marvin E. Frankel argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *J. F. Bishop.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The petitioners, Marcel Max Lutwak, Munio Knoll, and Regina Treitler, together with Leopold Knoll and Grace Klemtner, were indicted on six counts in the Northern District of Illinois, Eastern Division. The first count charged conspiracy to commit substantive offenses set forth in the remaining five counts and conspiracy "to defraud the United States of and concerning its governmental function and right of administering" the immigration laws and the Immigration and Naturalization Service, by obtaining the illegal entry into this country of three aliens as spouses of honorably discharged veterans. Grace Klemtner was dismissed from the indictment before the trial because her constitutional rights had been violated before the grand jury. At the conclusion of all the evidence, the District Court dismissed the substantive counts against all of the defendants because venue had not been shown in the Northern District of Illinois. The jury acquitted Leopold Knoll and convicted the three petitioners on the conspiracy count. The Court of Appeals affirmed, 195 F. 2d 748, and we granted certiorari, 344 U. S. 809.

We are concerned here only with the conviction of the petitioners of the alleged conspiracy. Petitioner Regina Treitler is the sister of Munio Knoll and Leopold Knoll,

and the petitioner Lutwak is their nephew. Munio Knoll had been married in Poland in 1932 to one Maria Knoll. There is some evidence that Munio and Maria were divorced in 1942, but the existence and validity of this divorce are not determinable from the record. At the time of the inception of the conspiracy, in the summer of 1947, Munio, Maria and Leopold were refugees from Poland, living in Paris, France, while Regina Treitler and Lutwak lived in Chicago, Illinois. Petitioner Treitler desired to get her brothers into the United States.

Alien spouses of honorably discharged veterans of World War II were permitted to enter this country under the provisions of the so-called War Brides Act which provides in pertinent part:

> ". . . notwithstanding any of the several clauses of section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of the effective date of this Act, be admitted to the United States . . . ." 59 Stat. 659, 8 U. S. C. § 232.

The first count of the indictment charged that the petitioners conspired to have three honorably discharged veterans journey to Paris and go through marriage ceremonies with Munio, Leopold and Maria. The brothers

and Maria would then accompany their new spouses to the United States and secure entry into this country by representing themselves as alien spouses of World War II veterans. It was further a part of the plan that the marriages were to be in form only, solely for the purpose of enabling Munio, Leopold and Maria to enter the United States. The parties to the marriages were not to live together as husband and wife, and thereafter would take whatever legal steps were necessary to sever the legal ties. It was finally alleged that the petitioners conspired to conceal these acts in order to prevent disclosure of the conspiracy to the immigration authorities.

The conspiracy to commit substantive offenses consisted in that part of the plan by which each of the aliens was to make a false statement to the immigration authorities by representing in his application for admission that he was married to his purported spouse, and to conceal from the immigration authorities that he had gone through a marriage ceremony solely for the purpose of gaining entry into this country with the understanding that he and his purported spouse would not live together as man and wife, but would sever the formal bonds of the ostensible marriage when the marriage had served its fraudulent purpose.

The statute defining conspiracy reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both." 18 U. S. C. (1946 ed.) § 88, now 18 U. S. C. (Supp. V) § 371.

The sections of the statute which it was alleged the petitioners conspired to violate provide in pertinent part:

> "Any alien who hereafter enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or by both such fine and imprisonment." 45 Stat. 1551, 8 U. S. C. § 180a.
>
> "Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both." 43 Stat. 153, 165, 8 U. S. C. (1946 ed.) § 220 (c), now 18 U. S. C. (Supp. V) § 1546.

From the evidence favorable to the Government, the jury could reasonably have believed that the following acts and transactions took place, and that the petitioners conspired to bring them about. Lutwak, a World War II veteran, was selected to marry Maria Knoll, his aunt by marriage. He went to Paris where he went through a marriage ceremony with Maria. They traveled to the United States, entering the port of New York on September 9, 1947. They represented to the immigration authorities that Maria was the wife of Lutwak, and upon that representation Maria was admitted. They never lived together as man and wife, and within a few months Munio and Maria commenced living together in this

country as man and wife, holding themselves out as such. Lutwak, in the meantime, represented himself to friends as an unmarried man. Lutwak and Maria were divorced on March 31, 1950.

Lutwak and Mrs. Treitler also found two women—Bessie Benjamin Osborne and Grace Klemtner—who were honorably discharged veterans of World War II, and who were willing to marry Munio and Leopold so that the brothers could come to the United States. Bessie Osborne was introduced to Treitler by Lutwak, and went to Paris accompanied by Treitler. There she went through a pretended marriage ceremony with Munio Knoll, and on their arrival at New York City, Munio was admitted on November 13, 1947, on the representation that he was married to Bessie Osborne. The marriage was never consummated and was never intended to be. The parties separated after entering the United States, and they never lived together as husband and wife at any time. Bessie Osborne's suit for divorce from Munio was pending at the time of the trial.

Still later, Grace Klemtner, who was also a World War II veteran and an acquaintance of Regina Treitler, went to Paris and went through a pretended marriage ceremony with Leopold. They then traveled to the United States, where Leopold was admitted on December 5, 1947, upon the representation that he was the husband of Grace Klemtner. They immediately separated after their entry into this country, and they never lived together as husband and wife at any time until about the time Grace Klemtner appeared before the grand jury which returned the indictment. This was approximately April 1, 1950, more than two years after the marriage ceremony in Paris. Bessie Osborne and Grace Klemtner received a substantial fee for participating in these marriage ceremonies.

There is an abundance of evidence in this record of a conspiracy to contract spurious, phony marriages for the

purposes of deceiving the immigration authorities and thereby perpetrating a fraud upon the United States, and of a conspiracy to commit other offenses against the United States.

Petitioners present three principal contentions: (1) Their conspiracy was not unlawful because the marriages involved were valid marriages; (2) the trial court erred in permitting the ostensible wives of these marriages to testify against their so-called husbands; and (3) the trial court erred in admitting testimony of various acts and declarations of different petitioners, done and said after the conspiracy had ended, without limiting the evidence to the particular defendant who performed the act or made the statement.

I.

At the trial, it was undisputed that Maria, Munio and Leopold had gone through formal marriage ceremonies with Lutwak, Bess Osborne and Grace Klemtner, respectively. Petitioners contended that, regardless of the intentions of the parties at the time of the ceremonies, the fact that the ceremonies were performed was sufficient to establish the validity of the marriages, at least until the Government proved their invalidity under French law. They relied on the general American rule of conflict of laws that a marriage valid where celebrated is valid everywhere unless it is incestuous, polygamous, or otherwise declared void by statute. See *Loughran* v. *Loughran,* 292 U. S. 216, 223; Restatement, Conflict of Laws, §§ 121, 132–134. Neither side presented any evidence of the French law, and the trial court ruled that in the absence of such evidence, the French law would be presumed to be the same as American law. The court later instructed the jury that "if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to

it as soon as it has served its purpose to deceive, they have never really agreed to be married at all." The petitioners claim that the trial court erred in presuming that the French law relating to the validity of marriages is the same as American law, and they further contend that even under American law these marriages are valid.

We do not believe that the validity of the marriages is material. No one is being prosecuted for an offense against the marital relation. We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States and to commit offenses against the United States. In the circumstances of this case, the ceremonies were only a step in the fraudulent scheme and actions taken by the parties to the conspiracy. By directing in the War Brides Act that "alien spouses" of citizen war veterans should be admitted into this country, Congress intended to make it possible for veterans who had married aliens to have their families join them in this country without the long delay involved in qualifying under the proper immigration quota. Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship; that petitioners so believed is evidenced by their care in concealing from the immigration authorities that the ostensible husbands and wives were to separate immediately after their entry into this country and were never to live together as husband and wife. The common understanding of a marriage, which Congress must have had in mind when it made provision for "alien *spouses*" in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations. Such was not the case here, or so the jury might reasonably have found. Thus, when one of the aliens stated that he was married, and omitted to explain the true nature of his marital

relationship, his statement did, and was intended to, carry with it implications of a state of facts which were not in fact true.

Because the validity of the marriages is not material, the cases involving so-called limited-purpose marriages,[1] cited by petitioners to support their contention that the marriages in the instant case are valid, are inapplicable. All of those cases are suits for annulment in which the court was requested to grant relief to one of the parties to a marriage on the basis of his own admission that the marriage had been a sham. Where the annulment was denied, one or more of the following factors influenced the court: (1) A reluctance to permit the parties to use the annulment procedure as a quick and painless substitute for divorce, particularly because this might encourage people to marry hastily and inconsiderately; (2) a belief that the parties should not be permitted to use the courts as the means of carrying out their own secret schemes; and (3) a desire to prevent injury to innocent third parties, particularly children of the marriage. These factors have no application in the circumstances of the instant case. Similarly inapplicable are the cases where a marriage was entered into in order to render the wife incompetent to testify against her husband in a pending trial, because in none of those cases was it proved that the parties to the marriage did not intend to enter into the marital relationship in good faith.[2] Much more closely related is the case of *United States* v. *Rubenstein*, 151 F. 2d 915, 918–919, in which the court held that where

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[1] *E. g., Schibi* v. *Schibi*, 136 Conn. 196, 69 A. 2d 831; *Hanson* v. *Hanson*, 287 Mass. 154, 191 N. E. 673. These and the other cases cited by petitioners are collected and discussed in a note, 14 A. L. R. 2d 624 (1950).

[2] *E. g., Norman* v. *State*, 127 Tenn. 340, 155 S. W. 135; *State* v. *Frey*, 76 Minn. 526, 79 N. W. 518.

two persons entered into a marriage solely for the purpose of facilitating the woman's entry into this country, and with no intention by either party to enter into the marriage relationship as it is commonly understood, for the purposes of that case they were never married at all. In the instant case, as in the *Rubenstein* case, there was no good faith—no intention to marry and consummate the marriages even for a day. With the legal consequences of such ceremonies under other circumstances, either in the United States or France, we are not concerned.

II.

Much of the evidence of the conspiracy comes from the lips of the so-called wives of these spurious marriages. The next question with which we are confronted is whether these so-called wives are competent to testify against their purported husbands in this criminal prosecution and thus incriminate the so-called husbands.

Civil marriage ceremonies were entered into by the parties in Paris as above indicated. Must these ostensible marriages be recognized as creating spouses in order that the marital relationship may be claimed to prevent the wives from testifying against the husbands? At common law the wife could testify neither for nor against her husband in a criminal case, but since *Funk* v. *United States,* 290 U. S. 371, the wife may testify in favor of the husband.

A review in the *Funk* case of the cases in this Court revealed the inconsistencies of the rule which made a wife incompetent to testify on *behalf* of her husband, and this Court resolved the question in favor of competency. The *Funk* case left the rules of evidence as to the competency of witnesses to be formulated by the federal courts or Congress in accordance with reason and experience. *Wolfle* v. *United States,* 291 U. S. 7, 12.

There followed the promulgation by this Court of Rule 26 of the Federal Rules of Criminal Procedure, which reads as follows:

"RULE 26. EVIDENCE.

". . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

This rule was a paraphrase of Mr. Justice Stone's statement in *Wolfle,* at 12.

Under this rule, the competency of witnesses is to be governed by the principles of the common law as they *may be* interpreted by the courts in the light of reason and experience. The governing principles are not necessarily as they had existed at common law. Congress has not acted, and has specifically authorized this Court to prescribe rules of criminal procedure, but the rules do not specifically answer the problem here. Therefore, it is open to us to say whether we shall go further and abrogate this common-law rule disqualifying one spouse from testifying in criminal cases *against* the other spouse.

When the good faith of the marital relation is pertinent and it is made to appear to the trial court, as it was here, that the relationship was entered into with no intention of the parties to live together as husband and wife but only for the purpose of using the marriage ceremony in a scheme to defraud, the ostensible spouses are competent to testify against each other. Here again, we are not concerned with the validity or invalidity of these so-called marriages. We are concerned only with the application of a common-law principle of evidence to the circumstances of this case. In interpreting the common law in this instance, we are to determine whether

"in the light of reason and experience" we should interpret the common law so as to make these ostensible wives competent to testify against their ostensible husbands. The reason for the rule at common law disqualifying the wife is to protect the sanctity and tranquility of the marital relationship. It is hollow mockery for the petitioners in arguing for the policy of the rule to invoke the reason for the rule and to say to us "the husband and wife have grown closer together as an emotional, social, and cultural unit" and to speak of "the close emotional ties between husband and wife" and of "the special protection society affords to the marriage relationship." In a sham, phony, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule.

> "It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States, supra,* at 383.

The light of reason and experience do not compel us to so interpret the common law as to disqualify these ostensible spouses from testifying in this case. We therefore hold that in the circumstances of this case, the common-law rule prohibiting antispousal testimony has no application. These ostensible wives were competent to testify.

III.

Most of the evidence in this case consisted of testimony of the acts and declarations of the defendants. The petitioners contend that because some of these acts and declarations took place after the conspiracy ended, they were erroneously admitted without being properly limited to the defendant who did the act or made the statement

testified to. We must, therefore, decide when the conspiracy ended. The petitioners contend it ended when the last of the parties, Leopold Knoll, was admitted to the United States on December 5, 1947. Then and there, they say, the fraud if any was complete, and the conspiracy to violate the statutes was complete. The Government contends that a part of the conspiracy was an agreement among the conspirators to conceal their fraud by any means, and so it was alleged in the indictment.

But there is no statement in the indictment of a single overt act of concealment that was committed after December 5, 1947, and no substantial evidence of any. Such acts as were set forth and proved were acts that revealed and did not conceal the fraud. Therefore, there is no evidence in the record to establish as a part of the conspiracy that the conspirators agreed to conceal the conspiracy by doing what was necessary and expedient to prevent its disclosure. There was a statement of Munio Knoll in the record to one witness Haberman that indicated Muñio's purpose to cover up and conceal the conspiracy. This is not evidence that the conspiracy included the further agreement to conceal. It is in the nature of an afterthought by the conspirator for the purpose of covering up. The trial court so understood it, and this statement of Munio Knoll, as testified to by Haberman, was limited by the Court as applicable against Munio Knoll only.

This Court in *Krulewitch* v. *United States,* 336 U. S. 440, rejected the Government's contention that in every conspiracy there is implicit an agreement as a part thereof for the conspirators to collaborate to conceal the conspiracy.

> "The rule contended for by the Government could have far-reaching results. For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in

> evidence tended to shield co-conspirators. We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence." *Id.*, at 444.

While the concealment was alleged in this indictment as a part of the conspiracy, it was not proved. We think on this record that the conspiracy ended December 5, 1947.

It does not necessarily follow that acts and declarations made after the conspiracy ended are not admissible. In this case, the essential fact of the conspiracy was the existence of phony marriage ceremonies entered into for the sole purpose of deceiving the immigration authorities and perpetrating a fraud upon the United States. *Acts* which took place after the conspiracy ended which were relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies were competent—such as the fact that the parties continued to live apart after they came to the United States; that money was paid the so-called wives as a consideration for their part in the so-called marriages; and that suits were started to terminate whatever legal relationship there might have been upon the record.

Declarations stand on a different footing. Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party. *Clune* v. *United States,* 159 U. S. 590, 593. See *United States* v. *Gooding,* 12 Wheat. 460, 468–470. But such declaration can be used against the co-conspirator only when made in furtherance of the conspiracy. *Fiswick* v. *United States,* 329 U. S. 211, 217; *Logan* v. *United States,* 144 U. S. 263, 308–309. There can be no furtherance of

a conspiracy that has ended. Therefore, the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended. That is the teaching of *Krulewitch* v. *United States, supra,* and *Fiswick* v. *United States, supra.* Those cases dealt only with declarations of one conspirator after the conspiracy had ended. They had no application to *acts* of a conspirator or others which were relevant to prove the conspiracy. True, there is dictum in *Logan* v. *United States, supra,* at 309, frequently repeated, which would limit the admissibility of both acts and declarations to the person performing them. This statement of the rule overlooks the fact that the objection to the declarations is that they are hearsay. This reason is not applicable to acts which are not intended to be a means of expression. The *acts,* being relevant to prove the conspiracy, were admissible, even though they might have occurred after the conspiracy ended. *United States* v. *Rubenstein,* 151 F. 2d 915, 917–918; see *Fitzpatrick* v. *United States,* 178 U. S. 304, 312–313; *Ferris* v. *United States,* 40 F. 2d 837, 839.

Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the *declarant's* participation therein. The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. Therefore, when the trial court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch.* Such declaration is inadmissible as to all but the declarant.

In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against

all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose. While these difficulties have been pointed out in several cases, *e. g., Krulewitch* v. *United States, supra,* at 453 (concurring opinion); *Blumenthal* v. *United States,* 332 U. S. 539, 559–560; *Nash* v. *United States,* 54 F. 2d 1006, 1006–1007, the rule has nonetheless been applied. *Blumenthal* v. *United States, supra; Nash* v. *United States, supra; United States* v. *Gottfried,* 165 F. 2d 360, 367.

In our search of this record, we have found only one instance where a declaration made after the conspiracy had ended was admitted against all of the alleged conspirators, even though not present when the declaration was made.[3] Was the admission of this one item of hearsay evidence sufficient to reverse this case?

We think not. In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one. This

[3] R. 208–209. Bessie Osborne testified: "I asked when action would be taken for divorce, and [Munio Knoll] asked me if I would wait two years because he wanted to become an American citizen, and it would take that long, and I agreed to wait." This hearsay statement attributed to Munio was admitted against all the defendants.

is a proper case for the application of Rule 52 (a) of the Federal Rules of Criminal Procedure.[4] We hold that the error was harmless.

Finding no reversible error in this record, the judgment is

Affirmed.

MR. JUSTICE JACKSON, whom MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER join, dissenting.

Whenever a court has a case where behavior that obviously is sordid can be proved to be criminal only with great difficulty, the effort to bridge the gap is apt to produce bad law. We are concerned about the effect of this decision in three respects.

1. We are not convinced that any crime has been proved, even on the assumption that all evidence in the record was admissible. These marriages were formally contracted in France, and there is no contention that they were forbidden or illegal there for any reason. It is admitted that some judicial procedure is necessary if the parties wish to be relieved of their obligations. Whether by reason of the reservations with which the parties entered into the marriages they could be annulled may be a nice question of French law, in view of the fact that no one of them deceived the other. We should expect it to be an even nicer question whether a third party, such as the state in a criminal process, could simply ignore the ceremony and its consequences, as the Government does here.

We start with marriages that either are valid or at least have not been proved to be invalid in their inception. The Court brushes this question aside as immaterial, but we think it goes to the very existence of an

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[4] "(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

offense. If the parties are validly married, even though the marriage is a sordid one, we should suppose that would end the case. On the other hand, if the marriage ceremonies were for some reason utterly void and held for naught, as if they never had happened, the Government could well claim that entry into the United States as married persons was fraud. But between these two extremes is the more likely case—marriages that are not void but perhaps voidable. In one of these cases, the parties (on the trial) expressed their desire to stay married, and they were acquitted; and no one contends that their marriage is void. Certainly if these marriages were merely voidable and had not been adjudged void at the time of the entry into this country, it was not a fraud to represent them as subsisting. We should think that the parties to them might have been prosecuted with as much reason if they had represented themselves to be single. Marriages of convenience are not uncommon and it cannot be that we would hold it a fraud for one who has contracted a marriage not forbidden by law to represent himself as wedded, even if there were grounds for annulment or divorce and proceedings to that end were contemplated.

The effect of any reservations of the parties in contracting the marriages would seem to be governed by the law of France. It does not seem justifiable to assume what we all know is not true—that French law and our law are the same. Such a view ignores some of the most elementary facts of legal history—the French reception of Roman law, the consequences of the Revolution, and the Napoleonic codifications. If the Government contends that these marriages were ineffectual from the beginning, it would seem to require proof of particular rules of the French law of domestic relations.

2. "The federal courts have held that one spouse cannot testify against the other unless the defendant spouse

waives the privilege. . . ." *Griffin* v. *United States,* 336 U. S. 704, 714, and cases cited. The Court condones a departure from this rule here because, it says, the relationship was not genuine. We need not decide what effect it would have on the privilege if independent testimony established that the matrimonial relationship was only nominal. Even then, we would think the formal relationship would be respected unless the trial court, on the question of privilege, wanted to try a collateral issue. However, in this case, the trial court could only conclude that the marriage was a sham from the very testimony whose admissibility is in question. The Court's position seems to be that privileged testimony may be received to destroy its own privilege. We think this is not allowable, for the same reason that one cannot lift himself by his own bootstraps.

3. We agree with the Court that the crime, if any, was complete when the alien parties obtained entry into the United States on December 5. We think this was the necessary result of the holding in *Krulewitch* v. *United States,* 336 U. S. 440. This requires rejection of the Government's contention that every conspiracy includes an implied secondary conspiracy to conceal the facts. This revival of the long-discredited doctrine of constructive conspiracy would postpone operation of the statute of limitations indefinitely and make all manner of subsequent acts and statements by each conspirator admissible in evidence against all. But, while the Court accepts the view of *Krulewitch,* we think its ruling on subsequent acts and declarations largely nullifies the effect of that decision and exemplifies the dangers pointed out therein.

For present purposes, we need not maintain that no admission or act of a conspirator occurring after the conspiracy has accomplished its object is admissible against a co-conspirator. And we do not question that at times

such evidence is admissible against the actor or speaker alone. But one of the additional leverages obtained by the prosecution through proceeding as for conspiracy instead of as for the substantive offense is that it may get into evidence against one defendant acts or omissions which color the case against all.

This case is a vivid illustration of that process in action. The statement of facts in the Government's brief is punctuated by eight separate footnotes to explain that the testimony recited in the text was limited to one or another defendant. We doubt that any member of this Court, despite our experience in sifting testimony, can carry in mind what was admitted against whom, and we are confident the jury could not. We will not prolong this opinion with an analysis of this testimony. Some of it was very damaging. For example, testimony was admitted, limited to Munio Knoll, that on one occasion he returned to his apartment and had difficulty getting in. When he gained admittance, petitioner Lutwak was going out through the window, leaving Knoll's wife to explain the phenomenon if she could. This testimony was not admitted against Lutwak, and the jury was adequately warned not to use it against him. But does anybody believe that the jury could forget that picture of Lutwak being caught taking hasty leave of his co-conspirator's wife and making a somewhat irregular exit? The salutary rule that evidence of acts which occurred long after the conspiracy terminated is admissible only against particular defendants should be observed in spirit as well as in letter. Here much of such evidence was of such remote probative value, and the instruction limiting its use was so predictably ineffectual, that its admission violated a substantial right of those defendants against whom it could not be used.

For these reasons we are impelled to dissent.

HOWARD ET AL. *v.* COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE ET AL.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 295. Argued January 12, 1953.—Decided February 9, 1953.

1. An area embracing a Naval Ordnance Plant within the State of Kentucky had been acquired by the United States by condemnation. The State consented to the acquisition and the United States accepted exclusive jurisdiction over the area. *Held:* The fact that the area was within the "exclusive jurisdiction" of the United States did not bar its annexation by the City of Louisville. Pp. 624–627.
2. A tax or license fee imposed by the City of Louisville for the privilege of working within the City, measured by one percent of income earned within the City, was an "income tax" within the meaning of the Buck Act, 4 U. S. C. §§ 105–110, and was authorized by that Act to be applied to payments received by federal employees for services performed at the Ordnance Plant, even though such tax or fee was not an "income tax" under state law. Pp. 627–629.

249 S. W. 2d 816, affirmed.

The Court of Appeals of Kentucky upheld a tax imposed by the City of Louisville, as applied to employees of a Naval Ordnance Plant. 249 S. W. 2d 816. On appeal to this Court, *affirmed,* p. 629.

W. A. Armstrong argued the cause for appellants. With him on the brief was *D. E. Armstrong.*

Gilbert Burnett and *Alex P. Humphrey* argued the cause and filed a brief for appellees.

MR. JUSTICE MINTON delivered the opinion of the Court.

Two questions are presented by this appeal: (1) The validity of the annexation by the City of Louisville, Kentucky, of certain federally owned land on which a

Naval Ordnance Plant is located; and (2) The validity of the Louisville occupational tax or license fee ordinance as applied to employees of this Ordnance Plant.

By condemnation proceedings filed in 1940, the United States acquired the land on which the Ordnance Plant is located, with the consent of the Legislature of Kentucky given in a general statute.[1] In 1941, the Secretary of the Navy on behalf of the United States accepted exclusive jurisdiction over the area, and the Governor of Kentucky acknowledged this acceptance. By ordinances enacted in 1947 and 1950, the City annexed certain territory, including the Ordnance Plant tract. The annexation was not challenged by the United States. After the annexation, the City started to collect from employees of the plant a license tax for the privilege of working in the city, measured by one percent of all salaries, wages and commissions earned in the city.[2]

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[1] "3.010. Consent of state to acquisition of lands. The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this state heretofore legally acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of forts, magazines, arsenals, dock yards, post offices, custom houses, courthouses and other needful buildings, and for locks, dams and canals in improving the navigation of the rivers and waters within and on the borders of Kentucky." Ky. Rev. Stat., 1948.

[2] "On and after July 1, 1950, every person, association, corporation or other entity engaged in any occupation, trade, profession, or other activity in the City shall pay into the Sinking Fund of the City for the purposes set forth under Section 91.200 of the Kentucky Revised Statutes as amended by an Act of the General Assembly of 1950, an annual license fee for the privilege of engaging in said activities, which license fee shall be measured by one per centum of (a) all salaries, wages, commissions and other compensations earned by every person in the City for work done or services performed or rendered in the City; and (b) the net profits of all businesses, professions, or occupations from activities conducted in the City." Ordinance 83, Series 1950, City of Louisville.

The appellants, employees of the Ordnance Plant, sued in the Jefferson Circuit Court of Kentucky on behalf of themselves and others similarly situated for a declaratory judgment that the Ordnance Plant is not within the City and therefore the employees are not subject to the tax levied on them by the City, and for an injunction restraining the collection of the tax. The appellees filed a special and a general demurrer which were overruled by the court. The appellees having refused to plead further, the court granted judgment in favor of the appellants on the pleadings, holding that the appellants were not subject to the tax because the area occupied by the United States could not be annexed by the City since it ceased to be a part of the Commonwealth of Kentucky when exclusive jurisdiction over it was acquired by the United States. Enforcement of the taxing ordinance was enjoined. The Court of Appeals of Kentucky reversed, 248 S. W. 2d 340, the Circuit Court accordingly entered judgment for the appellees, and the Court of Appeals affirmed, 249 S. W. 2d 816. We noted probable jurisdiction.

The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this we do not agree. When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within

the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

This question has been before other state courts, and the right to annex has been upheld. *Wichita Falls* v. *Bowen,* 143 Tex. 45, 52, 182 S. W. 2d 695, 699; *County of Norfolk* v. *Portsmouth,* 186 Va. 1032, 1047, 45 S. E. 2d 136, 142–143. We agree with these cases and hold that Louisville was free to annex the Ordnance Plant area.

Even though the Ordnance Plant is within the boundaries of the City of Louisville pursuant to the annexation, exclusive jurisdiction over the area still remains with the United States, except as modified by statute. U. S. Const., Art. I, § 8, cl. 17; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 652. Within this jurisdiction, the right to tax income paid to employees of the Government who worked at the Ordnance Plant was granted by 4 U. S. C. §§ 105–110, known as the Buck Act. Section 106 of this Act reads as follows:

> "§ 106. Same; income tax.
>
> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from trans-

actions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

"(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940." 4 U. S. C. (Supp. V) § 106.

Section 110 (c) defines "income tax" as follows:

"(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U. S. C. (Supp. V) § 110 (c).

Thus the right is specifically granted to the City of Louisville as a taxing authority of Kentucky to levy and collect a tax measured by the income or earnings of any party "receiving income from transactions occurring or services performed in such area . . . to the same extent and with the same effect as though such area was not a Federal area." In other words, Kentucky was free to tax earnings just as if the Federal Government were not there.

But the appellants next argue that the Court of Appeals erred in holding that the City's occupational tax or license fee was an "income tax" within the meaning of the Buck Act, though holding that this tax or fee was not an income tax under the Constitution of Kentucky.

Was this tax an "income tax" within the meaning of the Buck Act? In a prior case, Kentucky had held this tax was not an "income tax" within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the City of Louisville. *Louisville* v. *Sebree,* 308 Ky. 420, 429–431, 214 S. W. 2d 248, 253–254. But the right to tax earnings within the area

was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts. In the instant case, the Kentucky Court of Appeals correctly stated that the question was whether the tax was an income tax within the meaning of the federal law. We hold that the tax authorized by this ordinance was an income tax within the meaning of the Buck Act. The City, it is conceded, can levy such a tax within its boundaries outside the federal area. By virtue of the Buck Act, the tax can be levied and collected within the federal area, just as if it were not a federal area.

Since the area is within the boundaries of the City of Louisville, and this tax is an income tax within the meaning of the Buck Act, the tax is valid. The judgment is

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I have not been able to follow the argument that this tax is an "income tax" within the meaning of the Buck Act. It is by its terms a "license fee" levied on "the privilege" of engaging in certain activities. The tax is narrowly confined to salaries, wages, commissions and to the net profits of businesses, professions, and occupations. Many kinds of income are excluded, *e. g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of a tax the Kentucky Court of Appeals held it to be. *Louisville* v. *Sebree,* 308 Ky. 420, 214 S. W. 2d 248. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States.

UNITED STATES *v.* LANE MOTOR CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 499. Decided February 9, 1953.

A vehicle used solely for commuting to an illegal distillery is not used *in* violating the revenue laws within the meaning of § 3116 of the Internal Revenue Code and is not forfeitable thereunder. Pp. 630–631.

199 F. 2d 495, affirmed.

Solicitor General Cummings for the United States.

B. E. Harkey for respondent.

PER CURIAM.

In this proceeding, the Government sought the forfeiture of an automobile and of a truck under the provisions of § 3116 of the Internal Revenue Code in the District Court for the Eastern District of Oklahoma. That Section allows the seizure and forfeiture of property "intended for use in violating" the alcohol tax laws, as well as property "which has been so used." The respondent, alleging an interest in the two vehicles, contested the forfeitures.

The district judge found the facts to be that the truck and automobile had each been used by the operator of an illegal distillery to drive a number of miles from his home and then parked at a point one-half mile or more from the distillery, the operator walking the rest of the way. The district judge found that the Government had not shown, as it had alleged, that the vehicles had been used for transporting materials or utensils for use at the distillery, and ruled that the facts shown did not justify a forfeiture. The Court of Appeals for the Tenth Circuit affirmed, 199 F. 2d 495.

The Government has petitioned for a writ of certiorari showing that, while the Court of Appeals for the Third Circuit in *United States* v. *One 1948 Plymouth Sedan,* 198 F. 2d 399 (1952), held in accord with the Tenth Circuit, the Court of Appeals for the Sixth Circuit has taken a contrary view, *United States* v. *One 1950 Ford Half-Ton Pickup Automobile Truck,* 195 F. 2d 857 (1952). Certiorari is granted in order to resolve this conflict.

We think it clear that a vehicle used solely for commuting to an illegal distillery is not used *in* violating the revenue laws.

Certiorari granted, and the judgment affirmed.

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Reporter's Note.

The next page is purposely numbered 801. The numbers between 631 and 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM BEGINNING OF OCTOBER TERM, 1952, THROUGH FEBRUARY 9, 1953.

CASE DISMISSED IN VACATION.

No. 251. SAKIS ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Columbia. August 26, 1952. Dismissed per stipulation pursuant to Rule 35 of the Rules of this Court. *Donald S. Caruthers* for appellants. *Solicitor General Perlman* for the United States; *Edward M. Reidy* for the Interstate Commerce Commission; and *John L. Sullivan* for the Boston & Maine Railroad, appellees. Reported below: 103 F. Supp. 292.

OCTOBER 9, 1952.

Order Appointing Clerk.

It is ordered that Harold B. Willey be appointed Clerk of this Court in the place of Charles Elmore Cropley, deceased, and that he forthwith take the oath of office and give bond as required by statute and the order of this Court entered November 22, 1948.

OCTOBER 13, 1952.

Per Curiam Decisions.

No. 84. IVEY *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *L. N. D. Wells, Jr.* for appellant. *Price Daniel,* Attorney General of Texas, and *Willis E. Gresham* and *Calvin B. Garwood, Jr.,* Assistant Attorneys General, for appellee. Reported below: 156 Tex. Cr. R. ——, 247 S. W. 2d 105.

No. 81. AIKEN *v.* RICHARDSON. Appeal from the Court of Appeals of Georgia. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *G. Seals Aiken, pro se. Ralph Williams* for appellee. Reported below: 85 Ga. App. 180, 68 S. E. 2d 228.

No. 220. FERNANDEZ ET AL. *v.* KELLNER ET AL., CONSTITUTING THE FLORIDA STATE BOARD OF DENTAL EXAMINERS. Appeal from the Supreme Court of Florida. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *J. Tom Watson* for appellants. Reported below: 55 So. 2d 793.

No. 92. HALLIDAY, ADMINISTRATRIX, *v.* UNION PROPERTIES, INC. ET AL. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Harry L. Deibel* and *James M. De Vinne* for appellant. *Charles W. Sellers* for the Cleveland Metal Fabricating Co. et al., appellees. Reported below: 156 Ohio St. 262, 101 N. E. 2d 905.

No. 165. BENIS *v.* GEORGIA. Appeal from the Supreme Court of Georgia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Wallace Miller* and *Wallace Miller, Jr.* for appellant. *W. O. Cooper, Jr.* for appellee.

No. 228. FLORA REALTY & INVESTMENT CO. *v.* CITY OF LADUE. Appeal from the Supreme Court of Missouri. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Victor Packman* and *Morris Miller* for appellant. *John H. Cunningham, Jr.* for appellee. Reported below: 362 Mo. 1025, 246 S. W. 2d 771.

No. 241. Motors Insurance Corp. et al. *v.* Robinson, Superintendent of Insurance, et al. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *J. Rath Crabbe* and *Clarence D. Laylin* for appellants. *C. William O'Neill,* Attorney General of Ohio, *Robert E. Leach,* Chief Counsel, and *Ralph Klapp* and *Don W. Montgomery,* Assistant Attorneys General, for appellees. Reported below: 157 Ohio St. 354, 105 N. E. 2d 61.

No. 96. Jefferson *v.* Chronicle Publishing Co. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. Mr. Justice Black dissents. Mr. Justice Burton is of the opinion that probable jurisdiction should be noted. *Welburn Mayock* for appellant. *Oscar Lawler* and *John M. Hall* for appellee. Reported below: 108 Cal. App. 2d 538, 238 P. 2d 1018.

No. 103. Arnall, Director of Price Stabilization, *v.* Safeway Stores, Inc. On petition for writ of certiorari to the United States Emergency Court of Appeals. *Per Curiam:* The motion to substitute Tighe E. Woods, present Director of Price Stabilization, as the party petitioner in the place and stead of Ellis Arnall, resigned, is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Emergency Court of Appeals for consideration in the light of amendments to the Defense Production Act, approved June 30, 1952, 66 Stat. 296. *Philip B. Perlman,* then Solicitor General, and *Acting Solicitor General Stern* for petitioner. *Elisha Hanson, Arthur B. Hanson* and *Garland Clarke* for respondent. Reported below: 196 F. 2d 510.

No. 148. TIDE WATER ASSOCIATED OIL CO. *v.* ROBISON, ON BEHALF OF LOCAL 445, OIL WORKERS INTERNATIONAL UNION. Appeal from the Superior Court of California, Contra Costa County. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421. MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON are of the opinion that probable jurisdiction should be noted and the case set down for argument. *Marion B. Plant* for appellant. *Lindsay P. Walden* for appellee.

No. 166. ALL STATES FREIGHT, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Ohio. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *H. Russell Bishop* and *Bingham W. Zellmer* for appellant. *Solicitor General Perlman* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Carl Helmetag, Jr.* for the Central Territory Railroads, appellees.

No. 190. BROOKS TRANSPORTATION CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *J. Ninian Beall* and *William M. Blackwell* for appellant. *Solicitor General Perlman* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Wilmer A. Hill* for Falwell Fast Freight, Inc. et al., appellees. Reported below: 108 F. Supp. 244.

No. 174. MCGRATH, ATTORNEY GENERAL, *v.* NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA ET AL. Appeal from the United States District Court for the District of Columbia. *Per*

Curiam: The motion to vacate is granted. The judgment is vacated and the case is remanded to the United States District Court with directions to dismiss the complaint upon the ground that the case is moot. *Snyder* v. *Buck,* 340 U. S. 15. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Philip B. Perlman,* then Solicitor General, *Acting Solicitor General Stern, Philip Elman* and *Morton Hollander* for appellant. *Carl McFarland, Ashley Sellers, Raymond S. Smethurst* and *Kenneth L. Kimble* for appellees. Reported below: 103 F. Supp. 510.

No. 207. DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA ET AL. *v.* CITY OF DETROIT ET AL. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. MR. JUSTICE BURTON is of the opinion that probable jurisdiction should be noted. *Edward N. Barnard* for appellants. *James H. Lee* for appellees. Reported below: 332 Mich. 237, 51 N. W. 2d 228.

No. 211. SCOTT *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion for leave to proceed in forma pauperis is granted. The appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. Reported below: 56 So. 2d 839.

No. 224. GOOD ET AL. *v.* DOW CHEMICAL CO. Appeal from the Court of Civil Appeals of Texas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by

28 U. S. C. § 2103, certiorari is denied. *Hayden C. Covington* for appellants. *W. S. Elkins* and *Leroy Jeffers* for appellee. Reported below: 247 S. W. 2d 608.

Miscellaneous Orders.

No. —, Original. ARIZONA *v.* CALIFORNIA ET AL. A rule is ordered to issue, returnable within sixty days, requiring the defendants to show cause why leave to file the bill of complaint should not be granted. *Fred O. Wilson,* Attorney General of Arizona, *Alexander B. Baker,* Chief Assistant Attorney General, *John H. Moeur, Burr Sutter* and *Perry M. Ling* for complainant.

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. The answers of the State of New Mexico and Middle Rio Grande Conservancy District et al. are received and filed.

No. 1. LAND ET AL. *v.* DOLLAR ET AL.; and

No. 2. IN RE KILLION. On writs of certiorari, 341 U. S. 737, to the United States Court of Appeals for the District of Columbia Circuit. Dismissed on motions of counsel for petitioners. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of these motions. *Attorney General McGranery* for Land et al., petitioners in No. 1. *Arthur B. Dunne* for petitioner in No. 2. *Herman Phleger, Gregory A. Harrison, Moses Lasky, Edmund L. Jones* and *Howard Boyd* for Dollar et al., respondents. Reported below: See 88 U. S. App. D. C. 311, 190 F. 2d 366.

No. 5. SAWYER, SECRETARY OF COMMERCE, ET AL. *v.* DOLLAR ET AL.; and

No. 6. IN RE KILLION. On writs of certiorari, 342 U. S. 875, to the United States Court of Appeals for the District of Columbia Circuit. The judgment of the Court of Appeals is vacated and the cases are remanded to that court with directions to dismiss the proceedings upon the

ground that the cause is moot. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of these cases. *Attorney General McGranery* and *C. Dickerman Williams* for Sawyer, Secretary of Commerce, et al., petitioners in No. 5. *Arthur B. Dunne* for petitioner in No. 6. *Herman Phleger, Gregory A. Harrison, Moses Lasky, Edmund L. Jones* and *Howard Boyd* for respondents. Reported below: 89 U. S. App. D. C. 38, 190 F. 2d 623.

No. 353, October Term, 1950. LAND ET AL. *v.* DOLLAR ET AL., 340 U. S. 884. The motion of petitioners for leave to withdraw the motion for leave to file petition for reconsideration is granted. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Attorney General McGranery* for petitioners. *Herman Phleger, Gregory A. Harrison, Moses Lasky, Edmund L. Jones* and *Howard Boyd* for respondents.

No. 129. BABB *v.* BENJAMIN, CHIEF OF THE CHICAGO AREA, SOCIAL SECURITY ADMINISTRATION, ET AL. C. A. 7th Cir. Certiorari denied. Motion for leave to file petition for writ of mandamus also denied. Petitioner *pro se*. *Solicitor General Perlman* for respondents.

No. 54, Misc. SLUSSER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Motion to amend the petition for writ of certiorari granted.

No. 28, Misc. FISK *v.* FRISBIE, WARDEN. Supreme Court of Michigan. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 126, Misc. HICKS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Petition for appeal and motion for leave to file petition for writ of habeas corpus also denied.

No. 29, Misc. GODWIN *v.* HUNTER, WARDEN, ET AL.;
No. 34, Misc. EVANS *v.* OVERHOLSER, SUPERINTENDENT;
No. 36, Misc. GREER *v.* SOUTH CAROLINA;
No. 46, Misc. CURLANIS *v.* STEELE, WARDEN;
No. 50, Misc. JORDAN *v.* STEELE, WARDEN; and
No. 64, Misc. WHORTON *v.* EIDSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 38, Misc. COLLINS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

No. 95, Misc. PORT *v.* GOODMAN, DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Percy V. Long, Bert W. Levit, Arthur H. Kent* and *Valentine Brookes* for petitioner. *Acting Solicitor General Stern, Acting Assistant Attorney General Slack* and *Fred G. Folsom* for respondent.

No. 125, Misc. EX PARTE GREYVAN LINES, INC. Motion for leave to file petition for writ of mandamus denied. *Edward R. Adams, Drew L. Carraway, Homer S. Carpenter* and *Roland Rice* for petitioner. *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp, Charles H. Weston, E. Riggs McConnell* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; *Carl Helmetag, Jr.* for the Class I Railroads; and *Burton K. Wheeler, Robert G. Seaks* and *J. Albert Woll* for the Teamsters Union, respondents.

No. 19, Misc. SANGUIGNI *v.* FRISBIE, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 26, Misc. IN RE CLULOW. Application denied.

Certiorari Granted. (*See also No. 103, supra.*)

No. 66. LUTWAK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Anthony Bradley Eben, Richard F. Watt* and *Joseph L. Nellis* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 195 F. 2d 748.

No. 89. AUTOMATIC CANTEEN CO. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari granted. *Edward F. Howrey, L. A. Gravelle, Emil N. Levin* and *Elmer M. Leesman* for petitioner. *Solicitor General Perlman* and *W. T. Kelley* filed a memorandum for respondent, stating that the Government does not oppose allowance of the petition. Reported below: 194 F. 2d 433.

No. 139. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, *v.* UNITED STATES EX REL. MEZEI. C. A. 2d Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Jack Wasserman* for respondent. Reported below: 195 F. 2d 964.

No. 150. WESTERN PACIFIC RAILROAD CORP. ET AL. *v.* WESTERN PACIFIC RAILROAD CO. ET AL.; and

No. 160. METZGER ET AL. *v.* WESTERN PACIFIC RAILROAD CO. ET AL. C. A. 9th Cir. Certiorari granted. *Herman Phleger, Moses Lasky, Frank C. Nicodemus, Jr.* and *Norris Darrell* for petitioners in No. 150. *Julius Levy* for petitioners in No. 160. *Allan P. Matthew, James D. Adams* and *Walker W. Lowry* for the Western Pacific Railroad Co. et al., and *Everett A. Mathews, A. Donald MacKinnon* and *Forbes D. Shaw* for the Western Realty Co., respondents. Reported below: 197 F. 2d 994, 1012, 1013.

No. 203. CITY OF NEW YORK *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. C. A. 2d Cir. Cer-

tiorari granted. *Denis M. Hurley* and *Seymour B. Quel* for petitioner. *Edward R. Brumley* for respondent. Reported below: 197 F. 2d 428.

No. 205. UNITED STATES *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.; and

No. 206. COUNTY OF MINERAL, NEVADA, *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari granted. *Solicitor General Perlman* for the United States. *L. E. Blaisdell* for Mineral County, Nevada. *Everett C. McKeage* for the Public Utilities Commission of California; and *Henry W. Coil* and *Donald J. Carman* for the California Electric Power Co., respondents.

No. 218. MARTINEZ *v.* NEELLY, SUCCESSOR TO JORDAN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari granted. *Eugene Cotton* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Kenneth C. Shelver* for respondent. Reported below: 197 F. 2d 462.

No. 226. LAURITZEN *v.* LARSEN. C. A. 2d Cir. Certiorari granted. *James M. Estabrook* for petitioner. *Archibald McGrath, Richard M. Cantor* and *George Halpern* for respondent. Briefs of *amici curiae* supporting the petition were filed by *John Lord O'Brian* for the Royal Danish Government; *Lawrence Hunt* and *Wilbur E. Dow, Jr.* for the United Kingdom of Great Britain and Northern Ireland; *Frank Marcellino* for the Government of the Kingdom of the Netherlands; and *James S. Hemingway* for the Royal Norwegian Government. *Mr. Cantor* and *Mr. Halpern* filed a brief for the Seafarers International Union of North America et al., as *amici curiae,* opposing the petition. Reported below: 196 F. 2d 220.

No. 60. Pennsylvania Railroad Co. *v.* O'Rourke. C. A. 2d Cir. Certiorari granted. *John Vance Hewitt* for petitioner. *Herbert Zelenko* for respondent. Reported below: 194 F. 2d 612.

No. 75. Federal Trade Commission *v.* Motion Picture Advertising Service Co., Inc. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Charles Rosen* for respondent. Reported below: 194 F. 2d 633.

No. 76. Healy et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari granted. *Frank J. Maguire* for petitioners. *Solicitor General Perlman* for respondent. Reported below: 194 F. 2d 662.

No. 86. Local Union No. 10, United Association of Journeymen Plumbers and Steamfitters, et al. *v.* Graham et al., trading as Graham Brothers. Supreme Court of Appeals of Virginia. Certiorari granted. *John R. Foley* for petitioners. *Richmond Moore, Jr.* for respondents.

No. 97. National Labor Relations Board *v.* Dant et al., doing business as Dant & Russell, Ltd. C. A. 9th Cir. Certiorari granted. *Solicitor General Perlman* and *George J. Bott* for petitioner. *R. S. Smethurst* and *John T. Casey* for respondents. Reported below: 195 F. 2d 299.

No. 217. National Labor Relations Board *v.* Seven-Up Bottling Company of Miami, Inc. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* and *George J. Bott* for petitioner. *Albert B. Bernstein* and *Marion A. Prowell* for respondent. Reported below: 196 F. 2d 424.

No. 242. Bailess, County Treasurer, et al. *v.* Paukune. Supreme Court of Oklahoma. Certiorari granted. *R. L. Lawrence* and *R. F. Barry* for petitioners. *Reford Bond, Jr.* for respondent. Reported below: 206 Okla. 527, 244 P. 2d 1137.

No. 253. United States *v.* Certain Parcels of Land in the County of Fairfax, Virginia, et al. C. A. 4th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Joseph W. Wyatt* and *Frederick A. Ballard* for respondents. Reported below: 196 F. 2d 657.

No. 53. American Newspaper Publishers Association *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari granted limited to question No. 2 presented by the petition for the writ, *i. e.:*

"Whether the demand and insistence of the International Typographical Union that publishers pay employees in their composing rooms for setting 'bogus' violated Section 8 (b)(6) of the National Labor Relations Act in view of the fact that composing room employees perform no service incident or essential to the production of a newspaper in their handling of such 'bogused' material."

Elisha Hanson, William K. Van Allen and *Arthur B. Hanson* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Bernard Dunau* filed a memorandum for respondent, stating that counsel do not oppose the grant of the petition limited to the question of the interpretation of § 8 (b)(6) of the National Labor Relations Act. Reported below: 193 F. 2d 782.

No. 87. United States *v.* Rumely. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. Mr. Justice Burton and Mr. Justice Minton took no part in the consideration or decision

of this application. *Solicitor General Perlman* for the United States. *Donald R. Richberg, Alfons B. Landa* and *Delmar W. Holloman* for respondent. Reported below: 90 U. S. App. D. C. 382, 197 F. 2d 166.

No. 138. COMMISSIONER OF INTERNAL REVENUE *v.* SMITH. C. A. 6th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Sol Goodman* for respondent. Reported below: 194 F. 2d 536.

No. 182. GORDON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted limited to questions Nos. 2 and 3 presented by the petition for the writ, *viz.:*

"Where the key witness for the prosecution has given damaging evidence against the defendants and it is developed on cross-examination that the witness at the time of his arrest and on several occasions thereafter made written statements to the FBI in which he failed to implicate the defendants and in fact named another person as the one from whom he obtained the stolen merchandise, is it error to deny inspection and production of and cross-examination on the previous statements so that a full and complete disclosure may be had?

"Is it an undue restriction of cross-examination and deprivation of a fair trial to prohibit cross-examination of the Government's key witness which would have shown that at the time he entered his plea of guilty to the offense about which he testified against the defendants his own case had been referred to the Probation Department for presentence recommendation; that the witness' lawyer and the prosecutor had discussed disposition of the witness' case in chambers with the Court the previous day; that he was advised by the Court that if he expected a recommendation for lenient sentence or for probation, it would be essential that he satisfy the Probation Department that he had given the law enforcement authorities

full information, and that he was admonished by the Court that he would be 'well advised' to tell the probation authorities the whole story even though it might involve others."

George F. Callaghan for Gordon, and *Maurice J. Walsh* for MacLeod, petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 196 F. 2d 886.

No. 193. FORD MOTOR CO. *v.* HUFFMAN ET AL.; and

No. 194. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *v.* HUFFMAN ET AL. C. A. 6th Cir. Certiorari granted. Motion for leave to file brief of Veterans of Foreign Wars of the United States, as *amicus curiae,* denied. *William T. Gossett, L. Homer Surbeck* and *Richard W. Hogue, Jr.* for petitioner in No. 193. *Lowell Goerlich* and *Sol Goodman* for petitioner in No. 194. *Samuel M. Rosenstein* for respondents. Briefs of *amici curiae* supporting the petition in No. 193 were filed by *Nicholas Kelley, Francis S. Bensel* and *Hancock Griffin, Jr.* for the Chrysler Corporation; and *George Morris Fay* for the Briggs Manufacturing Co. *Louis S. Lebo* filed a brief for the Electric Auto-Lite Co., as *amicus curiae,* supporting the petitions. Reported below: 195 F. 2d 170.

No. 238. NATIONAL LABOR RELATIONS BOARD *v.* GAMBLE ENTERPRISES, INC. C. A. 6th Cir. Certiorari granted. *Solicitor General Perlman* and *George J. Bott* for petitioner. Reported below: 196 F. 2d 61.

No. 9, Misc. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *James T. Wright* for petitioner. *Solicitor General Perlman, Assistant, Attorney General*

McInerney, Beatrice Rosenberg and *Murry Lee Randall* for the United States. Reported below: 195 F. 2d 441.

No. 15, Misc. STEIN *v.* NEW YORK;

No. 16, Misc. WISSNER *v.* NEW YORK; and

No. 24, Misc. COOPER *v.* NEW YORK. Court of Appeals of New York. Certiorari granted limited to the question as to the admissibility of the confessions. *Philip J. O'Brien* and *Philip J. O'Brien, Jr.* for Stein; *I. Maurice Wormser, J. Bertram Wegman* and *Richard J. Burke* for Wissner; and *Peter L. F. Sabbatino* and *Thomas J. Todarelli* for Cooper, petitioners. *Burton C. Meighan* for respondent. Reported below: 303 N. Y. 856, 982, 104 N. E. 2d 917, 106 N. E. 2d 63.

No. 52, Misc. WELLS, ADMINISTRATRIX, *v.* SIMONDS ABRASIVE CO. C. A. 3d Cir. Certiorari granted limited to question No. 2 presented by the petition for the writ, *i. e.:*

"Does not the Pennsylvania Statute, as construed by the Court below, violate the Full Faith and Credit Clause of the United States Constitution?"

Henry S. Drinker, Charles J. Biddle and *Francis Hopkinson* for petitioner. *Philip Price* for respondent. Reported below: 195 F. 2d 814.

Certiorari Denied. (See also Nos. 129, 211 and 224 and Misc. Nos. 19, 28 and 126, supra.)

No. 45. PICKERILL ET AL. *v.* SCHOTT, DIRECTOR OF BEVERAGE DEPARTMENT. Supreme Court of Florida. Certiorari denied. *Nixon Butt* and *Frank J. Wideman* for petitioners. *Wm. Joe Sears, Jr.* and *A. H. Rothstein* for respondent. Reported below: 55 So. 2d 716.

No. 48. ALLEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *William B. Crawford* for petitioner. Reported below: 410 Ill. 508, 103 N. E. 2d 92.

No. 49. SIMPSON ET AL., DOING BUSINESS AS SIMPSON CONSTRUCTION CO., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Giles J. Patterson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 121 Ct. Cl. 506, 102 F. Supp. 562.

No. 50. ROBINS, DOING BUSINESS AS ROBINS TRANSFER CO., *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. *George W. Yancey* for petitioner. *Peyton D. Bibb* and *Charles Cook Howell* for respondent. Reported below: 192 F. 2d 657.

No. 54. MODERN MANUFACTURING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. *James Barnes* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling* and *Mozart G. Ratner* for the National Labor Relations Board, respondent. Reported below: 193 F. 2d 613.

No. 55. RUDDY BROOK CLOTHES, INC. *v.* BRITISH & FOREIGN MARINE INSURANCE CO., LTD. ET AL. C. A. 7th Cir. Certiorari denied. *Henry H. Koven* for petitioner. *Carl Meyer* and *Leo F. Tierney* for respondents. Reported below: 195 F. 2d 86.

No. 56. INTERNATIONAL TYPOGRAPHICAL UNION ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Henry Kaiser, Gerhard P. Van Arkel* and *Eugene Gressman* for petitioners. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Fannie M. Boyls* for the National Labor Relations Board; and *Elisha Hanson, William K. Van Allen* and *Arthur B. Hanson* for the American Newspaper Publishers Association, respondents. Reported below: 193 F. 2d 782.

No. 57. NORWITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Leo R. Friedman* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Meyer Rothwacks* and *Arthur B. Cunningham* for the United States. Reported below: 195 F. 2d 127.

No. 58. PROVIDENCE FRUIT & PRODUCE BLDG., INC. ET AL. *v.* GAMCO INCORPORATED. C. A. 1st Cir. Certiorari denied. *Frank Licht* for petitioners. *Loretta I. Martone* for respondent. Reported below: 194 F. 2d 484.

No. 59. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* TRANSIT ADVERTISERS, INC. C. A. 2d Cir. Certiorari denied. *Edward R. Brumley* for petitioner. *J. Edward Lumbard, Jr.* for respondent. Reported below: 194 F. 2d 907.

No. 61. YANISH ET AL. *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Allan Brotsky* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondent. Reported below: 196 F. 2d 53.

No. 62. OLSEN *v.* ARABIAN AMERICAN OIL CO.; and

No. 63. ALWINE *v.* ARABIAN AMERICAN OIL CO. C. A. 2d Cir. Certiorari denied. *Guy O. Walser* for petitioners. *Louis F. Huttenlocher* and *Thomas F. Barry* for respondent. Reported below: 194 F. 2d 477.

No. 64. ANDRUS ET AL. *v.* WHITMAN ET AL. C. A. 6th Cir. Certiorari denied. *I. Joseph Farley* for petitioners. *Frank E. Liverance, Jr.* for respondents. Reported below: 194 F. 2d 270.

No. 65. PRESSEY ET AL., DOING BUSINESS AS S. W. PRESSEY & SON, *v.* SCHLOTTMAN ET AL. C. A. 10th Cir.

Certiorari denied. *Emmett Thurmon* for petitioners. Reported below: 195 F. 2d 343.

No. 67. JEFFERSON LAKE SULPHUR CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Brunswick G. Deutsch* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Melva M. Graney* for the United States. Reported below: 195 F. 2d 1012.

No. 68. F. S. WHELAN & SONS *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *Hammond E. Chaffetz* and *Chauncey P. Carter, Jr.* for petitioner. *Solicitor General Perlman* and *John R. Benney* for the United States. Reported below: 39 C. C. P. A. (Cust.) 168.

No. 69. SHERWOOD DISTILLING CO. ET AL. *v.* PEOPLES FIRST NATIONAL BANK & TRUST CO. C. A. 4th Cir. Certiorari denied. *William Hoffenberg* and *Wilson K. Barnes* for petitioners. *Richard F. Cleveland* for respondent. Reported below: 194 F. 2d 387.

No. 70. ALGONQUIN GAS TRANSMISSION CO. ET AL. *v.* NORTHEASTERN GAS TRANSMISSION CO. ET AL.; and

No. 172. FEDERAL POWER COMMISSION *v.* NORTHEASTERN GAS TRANSMISSION CO. ET AL. C. A. 3d Cir. Certiorari denied. *Charles E. McGee* and *Helmer R. Johnson* for the Algonquin Gas Transmission Co.; and *David T. Searls, Charles I. Francis, Charles I. Thompson, W. D. Deakins, Jr.* and *J. Ross Gamble* for the Texas Eastern Transmission Corp., petitioners in No. 70. *Solicitor General Perlman* and *Bradford Ross* for the Federal Power Commission, petitioner in No. 172. *Charles V. Shannon* for the Northeastern Gas Transmission Co. et al., and *Ray C. Westgate* for the Fall River Gas Works Co., respondents. Reported below: 195 F. 2d 872.

No. 71. MUNDET CORK CORP. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Conover English* for petitioner. *Fred Herrigel, Jr.* for respondent. Reported below: 8 N. J. 359, 86 A. 2d 1.

No. 72. ROLES *v.* EARLE, COLLECTOR OF INTERNAL REVENUE, ET AL. C. A. 9th Cir. Certiorari denied. *Thomas L. Gatch* and *David Pattullo* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, A. F. Prescott* and *Carlton Fox* for respondents. Reported below: 195 F. 2d 346.

No. 73. H. B. ZACHRY CO. *v.* TERRY. C. A. 5th Cir. Certiorari denied. *Maury Maverick* and *Chester H. Johnson* for petitioner. *G. C. Mann* for respondent. Reported below: 195 F. 2d 185.

No. 78. NATIONAL LABOR RELATIONS BOARD *v.* ARTHUR WINER, INC. C. A. 7th Cir. Certiorari denied. *Solicitor General Perlman* and *George J. Bott* for petitioner. *Harry N. Wyatt* for respondent. Reported below: 194 F. 2d 370.

No. 82. NATIONAL MUTUAL INSURANCE CO. *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Cornelius H. Doherty* and *Alfred L. Bennett* for petitioner. Reported below: 90 U. S. App. D. C. 362, 196 F. 2d 597.

No. 83. LICHTENSTEIN ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *George E. Lindelof, Jr.* for petitioners. *Solicitor General Perlman, Charles H. Weston, William T. Kelley* and *Robert B. Dawkins* for respondent. Reported below: 194 F. 2d 607.

No. 88. BRODY *v.* MASSACHUSETTS. Superior Court of Suffolk County, Massachusetts. Certiorari denied. *Edward M. Dangel* and *Leo E. Sherry* for petitioner. *Francis E. Kelly,* Attorney General of Massachusetts, and *Henry P. Fielding,* Assistant Attorney General, for respondent.

No. 90. ANHEUSER-BUSCH, INC. ET AL. *v.* KAINZ ET AL., DOING BUSINESS AS MATT & NEAL'S LIQUORS, ET AL. C. A. 7th Cir. Certiorari denied. *Charles M. Price, Charles B. Mahin* and *Robert C. Keck* for Anheuser-Busch, Inc., and *Victor E. La Rue* for Home Delivery, Inc. et al., petitioners. *Hirsch E. Soble* for respondents. Reported below: 194 F. 2d 737.

No. 91. 58TH STREET PLAZA THEATRE, INC. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Paul R. Russell* and *Howard D. Pack* for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 195 F. 2d 724.

No. 93. REVEDIN *v.* ACHESON, SECRETARY OF STATE, ET AL. C. A. 2d Cir. Certiorari denied. *Cornelius W. Wickersham* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the Secretary of State, respondent. Reported below: 194 F. 2d 482.

No. 94. HERBERGER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Fred E. Youngman* and *John R. Benney* for respondent. Reported below: 195 F. 2d 293.

No. 98. WATWOOD *v.* STONE'S MERCANTILE AGENCY, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *H. Winship Wheatley* and *H. Winship Wheatley, Jr.* for respondent. Reported below: 90 U. S. App. D. C. 419, 194 F. 2d 160.

No. 99. BECK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Watson Washburn* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Joseph W. Bishop, Jr.* and *Melva M. Graney* for respondent. Reported below: 194 F. 2d 537.

No. 104. JONES ET AL., DOING BUSINESS AS JONES & HAITHCOCK USED CARS, *v.* HARPER, MAJOR GENERAL, UNITED STATES ARMY. C. A. 10th Cir. Certiorari denied. *Duke Duvall* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge, John F. Davis, Paul A. Sweeney* and *Hubert H. Margolies* for respondent. Reported below: 195 F. 2d 705.

No. 105. CHAPMAN ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jack K. Ayer* and *Stone Wells* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 194 F. 2d 974.

No. 107. SINCLAIR REFINING CO. *v.* GUTOWSKI. C. A. 6th Cir. Certiorari denied. *Milo H. Crawford* and *A. Stewart Kerr* for petitioner. Reported below: 195 F. 2d 637.

No. 109. GIRARD TRUST CORN EXCHANGE BANK, TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE.

C. A. 3d Cir. Certiorari denied. *Philip Price* and *George Craven* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Melva M. Graney* for respondent. Reported below: 194 F. 2d 708.

No. 110. WILLIAMS *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied. *Arthur J. Freund, Morris L. Ernst, Osmond K. Fraenkel* and *Herbert Monte Levy* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 194 F. 2d 917.

No. 114. TAYLOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Jackson A. Dykman* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *I. Henry Kutz* for respondent. Reported below: 194 F. 2d 528.

No. 115. STEEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Robert N. Anderson* for the United States. Reported below: 195 F. 2d 379.

No. 116. AMERICAN STEAMSHIP CO. *v.* INTERLAKE STEAMSHIP CO. C. A. 6th Cir. Certiorari denied. *Laurence E. Coffey* and *Lucian Y. Ray* for petitioner. *Thomas V. Koykka* for respondent. Reported below: 194 F. 2d 25.

No. 117. DEENA PRODUCTS CO. *v.* UNITED BRICK & CLAY WORKERS OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. *James G. Wheeler* for petitioner. *J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for respondents. Reported below: 195 F. 2d 612.

No. 118. Lanolin Plus Cosmetics, Inc. *v.* Marzall, Commissioner of Patents, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James R. McKnight* and *Emory L. Groff* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Hubert H. Margolies* for the Commissioner of Patents; and *Alfons B. Landa* and *Raymond C. Cushwa* for Botany Mills, Inc., respondents. Reported below: 90 U. S. App. D. C. 349, 196 F. 2d 591.

No. 119. Massachusetts Mutual Life Insurance Co. *v.* Smith. C. A. 5th Cir. Certiorari denied. *Harlan Hobart Grooms* for petitioner. *James A. Simpson* for respondent. Reported below: 194 F. 2d 1006.

No. 121. In re Bove. C. A. 3d Cir. Certiorari denied. Reported below: 196 F. 2d 217.

No. 122. Colon et al., trading as E. & J. Distributing Co., *v.* Federal Trade Commission. C. A. 2d Cir. Certiorari denied. *Arthur D. Herrick* for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Charles H. Weston, William T. Kelley* and *Robert B. Dawkins* for respondent. Reported below: 193 F. 2d 179.

No. 124. Electric Auto-Lite Co. *v.* National Labor Relations Board; and

No. 140. Local 12, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. *Louis S. Lebo* for petitioner in No. 124. *Lowell Goerlich* for petitioner in No. 140. *Solicitor General Perlman, George J. Bott, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 196 F. 2d 500.

No. 125. WHITE ET AL. *v.* CHICAGO LAND CLEARANCE COMMISSION. Supreme Court of Illinois. Certiorari denied. *Heber T. Dotson* and *Richard E. Westbrooks* for petitioners. *Clay Judson* for respondent. Reported below: 411 Ill. 310, 104 N. E. 2d 236.

No. 127. HOTEL & RESTAURANT EMPLOYEES' BARTENDERS' INTERNATIONAL UNION, A. F. OF L., ET AL. *v.* RICHARDS-GREENFIELD, INC. Circuit Court of Wayne County, Michigan. Certiorari denied. *Hugh Francis* for petitioners. *Guy W. Moore* for respondent.

No. 128. TILLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Arthur M. Fitzgerald* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 411 Ill. 473, 104 N. E. 2d 499.

No. 130. MARTIN *v.* COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. *Arthur W. Procter* and *Caleb A. Harding* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for respondent. Reported below: 39 C. C. P. A. (Pat.) 893, 195 F. 2d 303.

No. 131. LABRENZ ET AL. *v.* ILLINOIS EX REL. WALLACE ET AL. Supreme Court of Illinois. Certiorari denied. *Hayden C. Covington* for petitioners. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, and *John S. Boyle* for respondents. Reported below: 411 Ill. 618, 104 N. E. 2d 769.

No. 132. GENSMER *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. *John R. Foley, Sr.* and *John R. Foley, Jr.* for petitioner. *J. A. A. Burnquist,* Attorney General of Minnesota, *Charles E. Houston,* As-

sistant Attorney General, and *George B. Sjoselius,* Deputy Attorney General, for respondent. Reported below: 235 Minn. 72, 51 N. W. 2d 680.

No. 133. DELANY *v.* PADGETT ET AL. C. A. 5th Cir. Certiorari denied. *Theodore B. Stubbs* for petitioner. Reported below: 193 F. 2d 806.

No. 134. GOODYEAR TIRE & RUBBER CO., INC. *v.* TIERNEY ET AL. Supreme Court of Illinois. Certiorari denied. *Charles M. Spence* for petitioner. Reported below: 411 Ill. 421, 104 N. E. 2d 222.

No. 135. PARKER *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Jane A. Parker* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *Claude L. Love,* Assistant Attorney General, for respondent. Reported below: 235 N. C. 302, 69 S. E. 2d 542.

No. 136. AIR TRANSPORT ASSOCIATES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Warren E. Miller* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Clapp, J. Roger Wollenberg* and *Emory T. Nunneley, Jr.* for the Civil Aeronautics Board; and *L. Welch Pogue* for Alaska Airlines, Inc., respondents.

No. 141. WEBSTER *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Alexander H. Martin* for petitioner. *Joseph H. Crowley* for respondent. Reported below: 156 Ohio St. 279, 102 N. E. 2d 18.

No. 142. ESTATE OF HAUPTFUHRER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari

denied. *Henry S. Drinker* and *Frederick E. S. Morrison* for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Harry Marselli* for respondent. Reported below: 195 F. 2d 548.

No. 144. Carpenter Container Corp. *v.* Container Company. C. A. 3d Cir. Certiorari denied. *Hugh M. Morris, Alexander L. Nichols* and *Marvin C. Harrison* for petitioner. *Newton A. Burgess, Eugene G. Mason, H. H. Hamilton* and *John J. Mahoney* for respondent. Reported below: 194 F. 2d 1013.

Nos. 145 and 146. Campbell *v.* Deviny et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for respondents. With them on the briefs were *Herman Marcuse* in No. 145 and *Morton Hollander* in No. 146. Reported below: 90 U. S. App. D. C. 171, 176, 194 F. 2d 876, 881.

No. 147. Wabash Railroad Co. *v.* Byler. C. A. 8th Cir. Certiorari denied. *Sam B. Sebree* for petitioner. *John R. Baty* for respondent. Reported below: 196 F. 2d 9.

No. 149. Mills *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles E. Ford* and *H. Clifford Allder* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 90 U. S. App. D. C. 365, 196 F. 2d 600.

No. 151. Stoehr, trading as Stoehr & Fister, *v.* United States. C. A. 3d Cir. Certiorari denied. *Charles J. Margiotti* and *Samuel Goldstein* for petitioner.

Solicitor General Perlman, Acting Assistant Attorney General Slack and *John Lockley* for the United States. Reported below: 196 F. 2d 276.

No. 152. MONDAKOTA GAS CO. *v.* MONTANA-DAKOTA UTILITIES CO. C. A. 9th Cir. Certiorari denied. *Edward S. Shattuck* for petitioner. *John C. Benson* for respondent. Reported below: 194 F. 2d 705.

No. 158. OCHS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Carbery O'Shea* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Louise Foster* for respondent. Reported below: 195 F. 2d 692.

No. 159. WITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hyman M. Greenstein* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 196 F. 2d 285.

No. 161. MACHATY *v.* ASTRA PICTURES, INC. ET AL. C. A. 2d Cir. Certiorari denied. *Henry Pearlman* for petitioner. *Melvin A. Albert* for respondents. Reported below: 197 F. 2d 138.

No. 162. ASTRA PICTURES, INC. *v.* EUREKA PRODUCTIONS, INC. ET AL. C. A. 2d Cir. Certiorari denied. *Melvin A. Albert* for petitioner. *Henry Pearlman* for respondents. Reported below: 197 F. 2d 138.

No. 163. DEENA PRODUCTS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Sidney R. Zatz* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for respondent. Reported below: 195 F. 2d 330.

No. 164. SPENCER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Frederick Bernays Wiener* and *Thomas H. King* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 121 Ct. Cl. 558, 102 F. Supp. 774.

No. 169. MARTINEZ ET AL. *v.* RIVERA ET AL. C. A. 10th Cir. Certiorari denied. *Quincy D. Adams* for petitioners. *J. O. Seth* for respondents. Reported below: 196 F. 2d 192.

No. 170. SLACKMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Maury Hughes* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 196 F. 2d 501.

No. 171. RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD CO. *v.* BROOKS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *G. Bowdoin Craighill, Murray Preston* and *Wirt P. Marks, Jr.* for petitioner. *Bernard M. Savage* and *Alfred L. Bennett* for respondent. Reported below: 91 U. S. App. D. C. 24, 197 F. 2d 404.

No. 173. HANSEN *v.* ARABIAN AMERICAN OIL CO. C. A. 2d Cir. Certiorari denied. *Guy O. Walser* for petitioner. *Louis F. Huttenlocher* and *Thomas F. Barry* for respondent. Reported below: 195 F. 2d 682.

No. 175. FRIEDMAN *v.* HEATING EQUIPMENT MANUFACTURING CO. Court of Appeals of Ohio, Eighth District. Certiorari denied. *Edward D. Wyner* for petitioner. *Saul Perlis* for respondent.

No. 176. CRANE, DOING BUSINESS AS ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, *v.* JOSEPH DENUNZIO FRUIT CO. ET AL. C. A. 9th Cir. Certiorari denied. *Benjamin W. Shipman* for petitioner. *Eli H. Brown, III* and *Charles B. Tachau* for the Joseph Denunzio Fruit Co., respondent.

No. 177. GAGE *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edward S. Irons* and *Hamer H. Jamieson* for petitioner. *Acting Solicitor General Stern, Samuel D. Slade* and *Herman Marcuse* for the United States. Reported below: 122 Ct. Cl. 160, 103 F. Supp. 1022.

No. 180. PIGNATARO *v.* WATERMAN STEAMSHIP CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Philip F. Di Costanza* and *Jacob Rassner* for petitioner. *Charles H. Lawson* for Waterman Steamship Corp., respondent. Reported below: 194 F. 2d 404.

No. 183. SANDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Charles E. Dierker* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Vincent A. Kleinfeld* for the United States. Reported below: 196 F. 2d 895.

No. 186. ROBISON *v.* ROBISON. Supreme Court of New Jersey. Certiorari denied. *Theodore D. Parsons* for petitioner. *Paul M. Strack* for respondent. Reported below: 9 N. J. 288, 88 A. 2d 202.

No. 189. HARRIS *v.* HARRIS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Orille C. Gaudette* for petitioner. Reported below: 90 U. S. App. D. C. 239, 196 F. 2d 46.

No. 192. TAYLOR *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. *Alexander H. Sands, H. V. Forsyth* and *Wm. Marshall Bullitt* for petitioner. *J. D. Buckman, Jr.*, Attorney General of Kentucky, and *M. B. Holifield* and *H. D. Reed, Jr.*, Assistant Attorneys General, for respondent. Reported below: 246 S. W. 2d 981.

No. 195. T. M. DUCHE & SONS, INC. *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *George M. Morris, Albert MacC. Barnes* and *John H. Pratt* for petitioner. *Solicitor General Perlman* and *John R. Benney* for the United States. Reported below: 39 C. C. P. A. (Cust.) 186.

No. 196. FERGUSON ET AL. *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Clint T. Graydon* for petitioners. *T. C. Callison,* Attorney General of South Carolina, and *William A. Dallis,* Assistant Attorney General, for respondent. Reported below: 221 S. C. 300, 70 S. E. 2d 355.

No. 199. CROLICH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Edward Thornton* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 196 F. 2d 879.

No. 200. CLARK *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 6th Cir. Certiorari denied. *Hal H. Griswold* for petitioner. *R. T. Sawyer, Jr.* for respondent. Reported below: 196 F. 2d 206.

No. 201. SLENKER ET AL. *v.* GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS.

Supreme Court of Illinois. Certiorari denied. *Walter F. Dodd* and *Hubert L. Will* for petitioners. *William O. Morris* for respondent.

No. 202. California et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Edmund G. Brown,* Attorney General of California, *Walter L. Bowers,* Assistant Attorney General, and *James E. Sabine* and *Edward Sumner,* Deputy Attorneys General, for petitioners. *Acting Solicitor General Stern, Acting Assistant Attorney General Slack* and *Fred E. Youngman* for the United States. Reported below: 195 F. 2d 530.

No. 204. Continental Southern Lines, Inc. *v.* Civil Aeronautics Board et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *A. L. Wheeler* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Ralph S. Spritzer, Emory T. Nunneley, Jr.* and *O. D. Ozment* for the Civil Aeronautics Board, respondent. Reported below: 90 U. S. App. D. C. 352, 197 F. 2d 397.

No. 208. Grand Trunk Western Railroad Co. *v.* Adel Precision Products Corp. Supreme Court of Michigan. Certiorari denied. *H. V. Spike* and *Clayton F. Jennings* for petitioner. *Walter S. Foster* for respondent. Reported below: 332 Mich. 519, 51 N. W. 2d 922.

No. 209. Weiss *v.* Smith. C. A. 2d Cir. Certiorari denied. *William H. Timbers* for petitioner. *Frederick E. Weinberg* for respondent. Reported below: 198 F. 2d 268.

No. 212. A. Gusmer, Inc. *v.* McGranery, Attorney General, Successor to the Alien Property Custodian. United States Court of Appeals for the District of Colum-

bia Circuit. Certiorari denied. *Frank R. Bruce* and *A. K. Shipe* for petitioner. *Solicitor General Perlman, Rowland F. Kirks, James D. Hill, George B. Searls* and *Irwin A. Seibel* for respondent. Reported below: 90 U. S. App. D. C. 372, 196 F. 2d 860.

No. 213. SCHAEFER *v.* MACRI ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Carl E. Croson* for the Continental Casualty Co.; and *Harry Henke, Jr.* for McKelvy, respondents. Reported below: 196 F. 2d 162.

No. 214. BRIGANTINE BEACH HOTEL CORP. *v.* MARIANO, RECEIVER, ET AL. C. A. 3d Cir. Certiorari denied. *Philip Sterling* for petitioner. *Samuel P. Orlando* for Mariano; and *Louis Kravis* for the creditors, respondents. Reported below: 197 F. 2d 296.

No. 216. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* CHICAGO PACKAGED FUEL CO. C. A. 7th Cir. Certiorari denied. *Lowell Hastings, Drennan J. Slater* and *Amos M. Mathews* for petitioner. *Joseph H. Hinshaw* and *Oswell G. Treadway* for respondent. Reported below: 195 F. 2d 467.

No. 219. MAPLE ISLAND FARM, INC. *v.* BITTERLING. C. A. 8th Cir. Certiorari denied. *M. J. Doherty* and *Pierce Butler* for petitioner. *Roland J. Faricy* for respondent. Reported below: 196 F. 2d 55.

No. 221. ROSS ET AL. *v.* UNITED STATES; and

No. 273. ROSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert N. Gorman* and *Stanley A. Silversteen* for petitioners in No. 221. *Joseph B. Keenan* and *Alvin O. West* for petitioner in No. 273. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 197 F. 2d 660.

No. 222. WOHLMUTH *v.* ACHESON, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry F. Butler* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondent. Reported below: 90 U. S. App. D. C. 375, 196 F. 2d 866.

No. 223. GOLDBERGER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Kahl K. Spriggs* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 197 F. 2d 330.

No. 225. ILLINOIS EX REL. TARRANTO *v.* BABB, SHERIFF. Supreme Court of Illinois. Certiorari denied. *Thomas F. Dolan* for petitioner. Reported below: 412 Ill. 123, 105 N. E. 2d 750.

No. 229. LEFORCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Maury Hughes* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 196 F. 2d 1017.

No. 231. MCGEE ET AL. *v.* RECONSTRUCTION FINANCE CORPORATION ET AL. C. A. 5th Cir. Certiorari denied. *J. A. Amis, Jr.* for Pearce et al., petitioners. *Acting Solicitor General Stern, Assistant Attorney General Baldridge, Samuel D. Slade* and *Hubert H. Margolies* for the Reconstruction Finance Corporation, respondent. Reported below: 195 F. 2d 396.

No. 234. GULF REFINING CO. *v.* ATCHISON ET AL. C. A. 5th Cir. Certiorari denied. *Archie D. Gray* and *Melvin Evans* for petitioner. *Warren O. Coleman* for respondents. Reported below: 196 F. 2d 258.

No. 236. WEBER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Memorandum filed by MR. JUSTICE FRANKFURTER. *Howard W. Ameli* and *James F. Ryan* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 197 F. 2d 237.

MR. JUSTICE FRANKFURTER.

This is another instance where I deem it appropriate to indicate what was before us in a petition for certiorari. See *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912. One of the questions presented by this petition is the sufficiency of the claim that the verdict was vitiated because publications reflecting adversely on the defendant, before any testimony was taken in the case, precluded a fair and impartial trial. Under the circumstances the Court of Appeals, composed of Swan, Chief Judge, Augustus N. Hand and Frank, Circuit Judges, rejected the claim while acknowledging that

> "such comments by newspapers [as revealed by the exhibits herein] during the pendency of a criminal trial are inexcusable.[2]" *United States* v. *Weber,* 197 F. 2d 237, 239.

"[2] In England it is probable that the publishers would be severely penalized. See cases cited in Maryland v. Baltimore Radio Show, 338 U. S. 912, 921–936, 70 S. Ct. 252, 94 L. Ed. 562."

No. 237. WILLIAMS, DOING BUSINESS AS L. J. WILLIAMS LUMBER CO., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Henry Hammer* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 195 F. 2d 669.

No. 239. AERATION PROCESSES, INC. *v.* LANGE ET AL. C. A. 8th Cir. Certiorari denied. *H. A. Toulmin, Jr.*

and *Hugh M. Bennett* for petitioner. *John H. Bruninga* for respondents. Reported below: 196 F. 2d 981.

No. 252. McGuire et al. *v.* Todd et al. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *H. P. Kucera* for respondents. Reported below: 198 F. 2d 60.

No. 254. White *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Henry D. O'Connor* for petitioner. *Acting Solicitor General Stern, Acting Assistant Attorney General Slack, Lee A. Jackson* and *S. Dee Hanson* for respondent. Reported below: 196 F. 2d 728.

No. 255. Davenport *v.* United States. C. A. 5th Cir. Certiorari denied. *James H. Martin* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 197 F. 2d 157.

No. 256. Rising *v.* United States. C. A. 5th Cir. Certiorari denied. *James H. Martin* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 197 F. 2d 335.

No. 257. Washington Lumber & Millwork Co. *v.* Dant & Russell Sales Co. Supreme Court of Pennsylvania. Certiorari denied. *Edwin P. Rome* for petitioner. *Walter Biddle Saul* for respondent. Reported below: 370 Pa. 627, 88 A. 2d 757.

No. 259. Advance Machinery Exchange, Inc. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *J. H. Landman* for petitioner. *Acting*

Solicitor General Stern, Acting Assistant Attorney General Slack, Lee A. Jackson and *Joseph F. Goetten* for respondent. Reported below: 196 F. 2d 1006.

No. 261. BARNETT *v.* JENKINS. St. Louis Court of Appeals of Missouri. Certiorari denied. Petitioner *pro se*. *Milton F. Napier* for respondent. Reported below: 243 S. W. 2d 804.

No. 263. HARDENBERGH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Leland W. Scott* for petitioners. *Acting Solicitor General Stern, Acting Assistant Attorney General Slack* and *L. W. Post* for respondent. Reported below: 198 F. 2d 63.

No. 265. COAST *v.* HUNT OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. *William H. Bronson* for petitioner. *David T. Searls* and *J. D. Head* for the Hunt Oil Co., and *Calvin A. Brown, C. F. Currier, Leon O'Quin* and *Arthur O'Quin* for the Ohio Oil Co., respondents. Reported below: 195 F. 2d 870.

No. 268. DUPONT *v.* DUPONT. Supreme Court of Delaware. Certiorari denied. *Arthur G. Logan* for petitioner. *James R. Morford* for respondent. Reported below: —— Del. ——, 90 A. 2d 468.

No. 269. CITY OF LOS ANGELES ET AL. *v.* HOUSING AUTHORITY OF THE CITY OF LOS ANGELES. Supreme Court of California. Certiorari denied. *Ray L. Chesebro, William H. Neal, Bourke Jones* and *Charles S. Rhyne* for petitioners. *Joseph P. Loeb* and *Leonard S. Janofsky* for respondent. Reported below: 38 Cal. 2d 853, 243 P. 2d 515.

No. 270. KOBE, INC. ET AL. *v.* DEMPSEY PUMP CO. ET AL. C. A. 10th Cir. Certiorari denied. *Rufus S. Day, Jr.* and *Ford Harris, Jr.* for petitioners. *Fenelon Boesche, Richard B. McDermott, Charles M. McKnight* and *Robert F. Davis* for respondents. Reported below: 198 F. 2d 416.

No. 275. CARTER ET AL. *v.* SIMPSON, EXECUTRIX, ET AL. C. A. 7th Cir. Certiorari denied. *James E. Wilson* for petitioners. *John K. Ruckelshaus* for respondents. Reported below: 195 F. 2d 8.

No. 279. WEITKNECHT ET AL., EXECUTORS, *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert E. Kline, Jr.* for petitioners. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for respondent. Reported below: 90 U. S. App. D. C. 291, 195 F. 2d 570.

No. 282. DEALER'S TRANSPORT CO. *v.* GRASSE. Supreme Court of Illinois. Certiorari denied. *F. Trowbridge vom Baur* for petitioner. *James L. Coburn* for respondent. Reported below: 412 Ill. 179, 126 N. E. 2d 124.

No. 74. INDEPENDENT BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Harold E. Mott* and *Robert L. Heald* for petitioner. *Solicitor General Perlman, Benedict P. Cottone* and *Richard A. Solomon* for respondent. Reported below: 89 U. S. App. D. C. 396, 193 F. 2d 900.

No. 108. BREHM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Leo A. Rover* and *Clarence G. Pechacek* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 90 U. S. App. D. C. 370, 196 F. 2d 769.

No. 111. ROSENBERG ET AL. *v.* UNITED STATES; and

No. 112. SOBELL *v.* UNITED STATES. C. A. 2d Cir. The motion in No. 111 for leave to file brief of National Lawyers Guild, as *amicus curiae,* is denied. Certiorari denied. MR. JUSTICE BLACK is of the opinion the petitions should be granted. *Emanuel H. Bloch* for petitioners in No. 111. *Howard N. Meyer* for petitioner in No. 112. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *John R. Wilkins* for the United States. Reported below: 195 F. 2d 583.

No. 137. BURLINGTON COUNTY BRIDGE COMMISSION ET AL. *v.* DRISCOLL, GOVERNOR, ET AL.;

No. 184. NONGARD ET AL., TRADING AS KETCHAM & NONGARD, ET AL. *v.* DRISCOLL, GOVERNOR, ET AL.; and

No. 188. BELL *v.* DRISCOLL, GOVERNOR, ET AL. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of these applications. *Bennett Boskey* and *Robert L. Hood* for petitioners in No. 137. *Kenneth C. Royall, Milton M. Unger, John F. Caskey* and *Frederick W. R. Pride* for petitioners in No. 184. *Wm. A. Schnader, Bernard G. Segal* and *John E. Toolan* for petitioner in No. 188. *Theodore D. Parsons,* Attorney General of New Jersey, and *Walter D. Van Riper* for Driscoll et al.; *James D. Carpenter, Allen T. Klots, Augustus C. Studer, Jr.,*

Harold A. Price and *Peter H. Kaminer* for Bacon, Stevenson & Co. et al.; and *Waldron M. Ward* and *Donald B. Kipp* for the Chemical Bank & Trust Co. et al., respondents. Reported below: 8 N. J. 433, 86 A. 2d 201.

No. 143. JAROSZEWSKI *v.* CENTRAL RAILROAD CO. OF NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Isadore Glauberman* for petitioner. *Anthony T. Augelli* and *William F. Hanlon* for respondent. Reported below: 9 N. J. 231, 87 A. 2d 705.

No. 168. JOHNSON *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Charles J. Margiotti* for petitioner. *Acting Solicitor General Stern* and *Samuel D. Slade* for the United States. Reported below: 122 Ct. Cl. 100, 104 F. Supp. 106.

No. 215. FASS ET AL. *v.* GRAY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *O. John Rogge* and *Murray A. Gordon* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Baldridge* and *Samuel D. Slade* for respondent. Reported below: 91 U. S. App. D. C. 28, 197 F. 2d 587.

No. 235. WEST COAST MEAT CO. *v.* RECONSTRUCTION FINANCE CORPORATION. United States Emergency Court of Appeals. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Alexander Boskoff* for petitioner. *Acting Solicitor General Stern* and *Samuel D. Slade* for respondent. Reported below: 197 F. 2d 866.

No. 7, Misc. MOCK *v.* DAVIES, DEPUTY SHERIFF, ET AL. Supreme Court of California. Certiorari denied. *Rolla D. Mock* for petitioner. Reported below: 38 Cal. 2d 315, 239 P. 2d 876.

No. 8, Misc. RUBENS *v.* BOIES, SHERIFF, ET AL. Supreme Court of Arizona. Certiorari denied. Reported below: 73 Ariz. 101, 238 P. 2d 402.

No. 10, Misc. CEPERO *v.* PAN AMERICAN AIRWAYS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 195 F. 2d 453.

No. 11, Misc. HICKS *v.* REID, SUPERINTENDENT, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondents. Reported below: 90 U. S. App. D. C. 109, 194 F. 2d 327.

No. 13, Misc. LATIMER *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 14, Misc. WRIGHT *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 17, Misc. HODGES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 18, Misc. JIMENEZ-MELENDÉZ *v.* JONES, WARDEN. C. A. 1st Cir. Certiorari denied. *Santos P. Amadeo* and *Rafael V. Perez-Marchand* for petitioner. *Victor Gutierrez Franqui* for respondent. Reported below: 195 F. 2d 159.

No. 20, Misc. PRATT *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 21, Misc. DANIELS *v.* RAGEN, WARDEN. Circuit Court of Winnebago County, Illinois. Certiorari denied.

No. 22, Misc. TULLY *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 23, Misc. DUNBAR *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 25, Misc. BALLARD *v.* INTERNATIONAL HARVESTER Co. Supreme Court of Illinois. Certiorari denied. *Charles Wolff* for petitioner. *John A. Kratz* for respondent. Reported below: 410 Ill. 543, 103 N. E. 2d 109.

No. 30, Misc. DIAZ ET AL. *v.* CROM, TRUSTEE. C. A. 5th Cir. Certiorari denied. *J. Tom Watson* for Diaz, petitioner. Reported below: 195 F. 2d 517.

No. 31, Misc. NEAL *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 32, Misc. WITTE *v.* DOWD, WARDEN. Supreme Court of Indiana. Certiorari denied. *James C. Cooper* for petitioner. Reported below: 230 Ind. 485, 102 N. E. 2d 630.

No. 33, Misc. BITSAKIS *v.* WINE ET AL. Court of Appeals of New York. Certiorari denied. Reported below: 303 N. Y. 802, 104 N. E. 2d 361.

No. 35, Misc. ROBERTS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 37, Misc. YOUNGS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 39, Misc. PYEATTE *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 40, Misc. MIRANDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Maxwell W. Willens* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 196 F. 2d 408.

No. 41, Misc. KAVAL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 42, Misc. PALMER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Hugh Howell, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 121 Ct. Cl. 415.

No. 43, Misc. SHOTKIN *v.* LINDSLEY ET AL. Supreme Court of Colorado. Certiorari denied.

No. 44, Misc. SMALL *v.* SHAW, DIRECTOR OF DANNEMORA STATE HOSPITAL. Court of Appeals of New York. Certiorari denied.

No. 45, Misc. GRESHAM *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 47, Misc. LAZENBY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 48, Misc. GREENE *v.* ROBINSON, WARDEN, ET AL. Circuit Court of Peoria County, Peoria, Illinois. Certiorari denied.

No. 49, Misc. BOOTH *v.* KING, SUPERINTENDENT. Supreme Court of California. Certiorari denied.

No. 51, Misc. ALLEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 411 Ill. 582, 104 N. E. 2d 768.

No. 53, Misc. GLIVA *v.* JACQUES, WARDEN, ET AL. Supreme Court of Michigan. Certiorari denied.

No. 55, Misc. GEORGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 196 F. 2d 445.

No. 56, Misc. MARTINEZ ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *G. Wray Gill* for petitioners. Reported below: 220 La. 899, 57 So. 2d 888.

No. 57, Misc. DIXON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 58, Misc. HEIN *v.* CRANOR, SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. *Will G. Beardslee* and *Graham K. Betts* for petitioner. Reported below: 194 F. 2d 288.

No. 59, Misc. WATERMAN *v.* NELSON ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondents. Reported below: 195 F. 2d 523.

No. 60, Misc. POLK *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 61, Misc. SHOTKIN *v.* BLACK, DISTRICT COURT JUDGE, ET AL. Supreme Court of Colorado. Certiorari denied.

No. 62, Misc. TIMMONS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Ed Dupree, A. M. Edwards* and *Nathan Siegel* for the United States. Reported below: 194 F. 2d 357.

No. 63, Misc. KERSHNER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 9 N. J. 471, 88 A. 2d 849.

No. 65, Misc. BARBEE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 66, Misc. SUPERO *v.* ILLINOIS. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 67, Misc. GUSIK *v.* SCHILDER, WARDEN. C. A. 6th Cir. Certiorari denied. *Morris Morgenstern, Bernard B. Direnfeld, Leo Chimo, Francis Picklow, Marvin L. Shaw* and *Cedric Griffith* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 195 F. 2d 657.

No. 68, Misc. LASALLE *v.* CARTY, WARDEN. Supreme Court of New Jersey. Certiorari denied.

No. 71, Misc. PACKWOOD *v.* BRIGGS & STRATTON CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Thomas Cooch*

and *John E. Hubbell* for petitioner. *Ira Milton Jones* and *Arthur G. Connolly* for respondents. Reported below: 195 F. 2d 971.

No. 73, Misc. STEWART *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied. *George Bailes* and *Myron S. Rudd* for petitioner. Reported below: 156 Ohio St. 521, 103 N. E. 2d 551.

No. 74, Misc. BOLDEN *v.* DEPARTMENT OF PUBLIC SAFETY ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 79, Misc. MATVEYCHUK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for the United States. Reported below: 195 F. 2d 613.

No. 80, Misc. CAREY *v.* KEEPER OF THE MONTGOMERY COUNTY PRISON. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 370 Pa. 604, 88 A. 2d 904.

No. 81, Misc. MADDRON *v.* INDIANA ET AL. Superior Court of St. Joseph County, Indiana. Certiorari denied.

No. 82, Misc. PODOLSKI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Reported below: 332 Mich. 508, 52 N. W. 2d 201.

No. 83, Misc. PONCE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 84, Misc. GERMANY *v.* HUDSPETH, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied. Reported below: 173 Kan. 214, 245 P. 2d 981.

No. 85, Misc. SHANNON *v.* UNION BARGE LINE CORP. C. A. 3d Cir. Certiorari denied. *Victor Rabinovitz* for petitioner. *Selim B. Lemle* for respondent. Reported below: 194 F. 2d 584.

No. 88, Misc. PIERCE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward A. McCabe* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 91 U. S. App. D. C. 19, 197 F. 2d 189.

No. 90, Misc. RUBINO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 92, Misc. FREY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 93, Misc. FOWLER *v.* NEW YORK. Supreme Court of New York, Appellate Division, Third Department. Certiorari denied.

No. 94, Misc. RIVERS *v.* INDIANA ET AL. Circuit Court of St. Joseph County, Indiana. Certiorari denied.

No. 96, Misc. MIMMS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 97, Misc. KERR *v.* TEETS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 197 F. 2d 151.

No. 98, Misc. STELLOH *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. Reported below: 262 Wis. 114, 53 N. W. 2d 700.

No. 100, Misc. GIRON ET AL. *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 103, Misc. WESTER *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Reported below: 110 Cal. App. 2d 650, 242 P. 2d 56.

No. 104, Misc. ROBINSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 106, Misc. DI VINCENZO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman* and *Acting Assistant Attorney General Slack* for respondent. Reported below: 196 F. 2d 218.

No. 108, Misc. SEVERA *v.* BOROUGH OF THROOP ET AL. C. A. 3d Cir. Certiorari denied.

No. 109, Misc. KNOTT *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 90 A. 2d 177.

No. 110, Misc. BREWER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 69, Misc. GOLEMON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Bernard A. Golding* for petitioner. *Price Daniel,* Attorney General of Texas, and *Calvin B. Garwood, Jr.,* Assistant Attorney General, for respondent. Reported below: 156 Tex. Cr. R. ——, 247 S. W. 2d 119.

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No. 89, Misc. REID *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Harold Buchman* for petitioner. *Hall Hammond,* Attorney General of Maryland, for respondent. Reported below: — Md. —, 89 A. 2d 227.

Rehearing Denied.

No. 449, October Term, 1950. PETRONE *v.* UNITED STATES, 340 U. S. 931;

No. 151, October Term, 1951. UNITED STATES ET AL. *v.* GREAT NORTHERN RAILWAY CO., 343 U. S. 562;

No. 176, October Term, 1951. LELAND *v.* OREGON, 343 U. S. 790;

No. 517, October Term, 1951. MCGEE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* EKBERG, 343 U. S. 970;

No. 543, October Term, 1951. ON LEE *v.* UNITED STATES, 343 U. S. 747;

No. 762, October Term, 1951. BLOCK *v.* COLORADO, 343 U. S. 978; and

No. 788, October Term, 1951. EIGHT O'CLOCK CLUB ET AL. *v.* BUDER ET AL., 343 U. S. 971. Petitions for rehearing denied.

No. 611, October Term, 1950. MALOY *v.* FLORIDA, 341 U. S. 947. Motion for leave to file a second petition for rehearing denied.

No. 401, October Term, 1951. JOHANSEN *v.* UNITED STATES, 343 U. S. 427; and

No. 414, October Term, 1951. MANDEL, ADMINISTRATOR, *v.* UNITED STATES, 343 U. S. 427. The motions for leave to file briefs of (1) Herbert L. Johnson, and (2) Cora Mae Meyer, Administratrix, etc., as *amici curiae,* in Nos. 401 and 414; and briefs of (1) National Asso-

ciation of Claimants' Compensation Attorneys; (2) Melvin M. Belli and others; (3) B. A. Green; and (4) Seafarer's International Union, as *amici curiae*, in No. 414 are denied. The petitions for rehearing are denied.

No. 624, October Term, 1951. CADDEN *v.* KENTUCKY, 343 U. S. 976. Motion for leave to file petition for rehearing denied.

No. 714, October Term, 1951. UNION CARBIDE & CARBON CORP. *v.* GRAVER TANK & MFG. CO., INC. ET AL., 343 U. S. 967. Rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 394, Misc., October Term, 1951. HOUSE *v.* HIATT, WARDEN, 343 U. S. 925;

No. 409, Misc., October Term, 1951. WELDON *v.* UNITED STATES, 343 U. S. 967;

No. 422, Misc., October Term, 1951. HAMILTON *v.* UNITED STATES, 343 U. S. 980;

No. 440, Misc., October Term, 1951. TAYLOR *v.* STEELE, SUPERINTENDENT, 343 U. S. 973;

No. 475, Misc., October Term, 1951. AYERS *v.* PARRY ET AL., 343 U. S. 980;

No. 481, Misc., October Term, 1951. LINDSEY *v.* WATSON ET AL., 343 U. S. 969;

No. 486, Misc., October Term, 1951. LAWRENCE *v.* UNITED STATES, 343 U. S. 981;

No. 487, Misc., October Term, 1951. CASONE *v.* TENNESSEE, 343 U. S. 969;

No. 503, Misc., October Term, 1951. HEWLETT *v.* CALIFORNIA, 343 U. S. 981; and

No. 518, Misc., October Term, 1951. CARPENTER *v.* ERIE RAILROAD CO., 343 U. S. 987. Petitions for rehearing denied.

No. 570, October Term, 1951. KAWAKITA *v.* UNITED STATES, 343 U. S. 717. Rehearing denied. MR. JUSTICE FRANKFURTER and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 309, Misc., October Term, 1951. FREAPANE *v.* ILLINOIS, 342 U. S. 956. Third petition for rehearing denied.

No. 397, Misc., October Term, 1951. TATE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL., 343 U. S. 925. Second petition for rehearing denied.

OCTOBER 15, 1952.

Miscellaneous Orders.

No. 111. ROSENBERG ET AL. *v.* UNITED STATES; and

No. 112. SOBELL *v.* UNITED STATES. Orders denying certiorari, *ante,* p. 838, withheld pending the filing and disposition of petitions for rehearing on motions of counsel for petitioners.

OCTOBER 20, 1952.

Miscellaneous Orders.

No. 70. ALGONQUIN GAS TRANSMISSION CO. ET AL. *v.* NORTHEASTERN GAS TRANSMISSION CO. ET AL. The motion to withhold the order denying certiorari, *ante,* p. 818, pending the filing and disposition of a petition for rehearing is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 95. WOTTLE, ADMINISTRATOR, *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. Certiorari, 343 U. S. 963, to the United States Court of Appeals for the Tenth Cir-

cuit. Dismissed pursuant to stipulation of counsel. *John L. Laskey* for petitioner. *E. C. Iden* for respondent. Reported below: 193 F. 2d 628.

No. 153. UNITED STATES *v.* EXCEL PACKING CO., INC.;
No. 154. UNITED STATES *v.* BROWN ET AL.; and
Nos. 155, 156 and 157. UNITED STATES *v.* EXCEL PACKING CO., INC. ET AL. Appeals from the United States District Court for the District of Kansas. Dismissed on motions of counsel for appellant. *Acting Solicitor General Stern* for the United States. *Emmet A. Blaes* for appellees.

No. 131, Misc. JERONIS *v.* STARR, U. S. DISTRICT JUDGE. Petition for writ of mandamus dismissed on motion of petitioner.

No. 77, Misc. REED *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. *W. J. Durham* for petitioner. Reported below: 156 Tex. Cr. R. —, 251 S. W. 2d 734.

No. 138, Misc. LYLE *v.* EIDSON, WARDEN. C. A. 8th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Reported below: 197 F. 2d 327.

No. 140, Misc. FAUBERT *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 107, Misc. CRUMMER COMPANY ET AL. *v.* DUPONT ET AL., TRUSTEES, ET AL. Motion for leave to file petition for writ of certiorari to the Circuit Court of Appeals for

the Fifth Circuit denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Robert J. Pleus, Chris Dixie* and *Joseph P. Lea, Jr.* for petitioners. *Richard W. Ervin,* Attorney General of Florida, *Ralph McLane,* Assistant Attorney General, *Henry P. Adair, Donald Russell, Charles R. Scott* and *H. M. Voorhis* for respondents. Reported below: 196 F. 2d 468.

No. 115, Misc. WILLIAMS *v.* ALABAMA. Motion for leave to file petition for writ of mandamus denied.

No. 116, Misc. MULKEY *v.* MICHIGAN. Motion for leave to file an appeal denied.

No. 127, Misc. GALLOWAY *v.* U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 129, Misc. BYERS *v.* STEELE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 159, Misc. SCHNEIDER *v.* TIPTON. Application denied.

No. 176, Misc. FUJIMOTO ET AL. *v.* WIIG, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition or mandamus denied. MR. JUSTICE BLACK would issue a rule to show cause. *Harriet Bouslog* for petitioners.

Certiorari Granted.

No. 230. RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari granted. *Herbert S. Thatcher* and *Abner H. Silverman* for petitioner.

Acting Solicitor General Stern, George J. Bott, David P. Findling, Mozart G. Ratner and *Elizabeth W. Weston* filed a memorandum for respondent stating that they do not oppose the granting of the petition limited to the question of the interpretation of § 8 (a)(3) of the National Labor Relations Act. Reported below: 196 F. 2d 960.

No. 278. RAMSPECK ET AL. *v.* FEDERAL TRIAL EXAMINERS CONFERENCE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for the members of the Civil Service Commission and the National Labor Relations Board, petitioners. *Charles S. Rhyne* and *Eugene J. Bradley* for respondents. Reported below: 91 U. S. App. D. C. 164, 202 F. 2d 312.

No. 287. POLIZZI *v.* COWLES MAGAZINES, INC. C. A. 5th Cir. Certiorari granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *John D. Marsh* for petitioner. *Arthur E. Farmer* for respondent. Reported below: 197 F. 2d 74.

No. 301. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA. C. A. 8th Cir. Certiorari granted. *Acting Solicitor General Stern* and *George J. Bott* for petitioner. *Clif Langsdale* for respondent. Reported below: 196 F. 2d 1.

No. 262. CALMAR STEAMSHIP CORP. *v.* UNITED STATES; and

No. 303. CALMAR STEAMSHIP CORP. *v.* SCOTT ET AL. C. A. 2d Cir. Certiorari granted. *Edwin S. Murphy, Ira A. Campbell* and *Helen C. Cunningham* for petitioner. *Acting Solicitor General Stern* filed a memorandum

stating that the Government does not oppose the granting of the petition in No. 262, and also a memorandum for the United States, as *amicus curiae,* in No. 303, agreeing that the petition raises important questions of federal law appropriate for decision by this Court. *Russell T. Mount* for respondents in No. 303. Reported below: 197 F. 2d 795.

Certiorari Denied. (*See also Misc. Nos. 77, 107, 138 and 140, supra.*)

No. 178. Depew Paving Co., Inc. *v.* United States. Court of Claims. Certiorari denied. *Robert Ash* for petitioner. *Acting Solicitor General Stern* and *Samuel D. Slade* for the United States. Reported below: 122 Ct. Cl. 151, 104 F. Supp. 94.

No. 232. United States *v.* Schaeffer et al. Court of Claims. Certiorari denied. *Philip B. Perlman,* then Solicitor General, and *Acting Solicitor General Stern* for the United States. *Solomon Dimond* for respondents. Reported below: 121 Ct. Cl. 869.

No. 260. Aron *v.* Snyder, Secretary of the Treasury, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harold G. Aron, pro se.* Reported below: 90 U. S. App. D. C. 325, 196 F. 2d 38.

No. 272. Shell Oil Co. *v.* Wilkin et al.; and

No. 297. Wilkin et al. *v.* Shell Oil Co. C. A. 10th Cir. Certiorari denied. *Geo. W. Cunningham* and *Gordon Watts* for petitioner in No. 272. *A. W. Gilliland* and *H. D. Moreland* for petitioners in No. 297 and respondents in No. 272. Reported below: 197 F. 2d 42.

No. 276. PENNSYLVANIA RAILROAD CO. *v.* DONNELLY. Supreme Court of Illinois. Certiorari denied. *James H. Winston, Edward R. Adams* and *Theodore Schmidt* for petitioner. *Ezra L. D'Isa* for respondent. Reported below: 412 Ill. 115, 105 N. E. 2d 730.

No. 277. UNITED STATES *v.* ABRAMS ET AL., DOING BUSINESS AS CURTIS KEY CO. C. A. 6th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Amos Burt Thompson* for respondents. Reported below: 197 F. 2d 803.

No. 280. HOBBS *v.* HOBBS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Raymond Godbersen* for petitioner. *George A. Hospidor* for respondent. Reported below: 91 U. S. App. D. C. 68, 197 F. 2d 412.

No. 281. KLEIN *v.* DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied. *Mayer Goldberg* for petitioner. Reported below: 412 Ill. 75, 105 N. E. 2d 758.

No. 285. R. H. JOHNSON & CO. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. *Orrin G. Judd* for petitioners. *Acting Solicitor General Stern, John F. Davis* and *Louis Loss* for the Securities and Exchange Commission, respondent. Reported below: 198 F. 2d 690.

No. 286. HOLLAND COMPANY *v.* AMERICAN STEEL FOUNDRIES. C. A. 7th Cir. Certiorari denied. *Casper W. Ooms* and *L. B. Mann* for petitioner. *George I. Haight* and *Orrin O. B. Garner* for respondent. Reported below: 196 F. 2d 749.

No. 288. SKINNER ET AL. *v.* DOW CHEMICAL CO. C. A. 6th Cir. Certiorari denied. *William H. Parmelee* and *Leo T. Wolford* for petitioners. *Clarence B. Zewadski* for respondent. Reported below: 197 F. 2d 807.

No. 324. ORTMAN, SPECIAL ADMINISTRATOR, *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied. *Tom Kirby* for petitioner. *M. T. Woods* for respondents. Reported below: 198 F. 2d 123.

No. 123. KAISER-FRAZER CORPORATION *v.* OTIS & CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of this application. *John W. Davis, Mark F. Hughes, George Edward Cotter* and *Helmer R. Johnson* for petitioner. *Abe Fortas* and *Milton V. Freeman* for respondent. Reported below: 195 F. 2d 838.

No. 227. CREEK NATION *v.* MCGHEE ET AL.;
No. 247. UNITED STATES *v.* MCGHEE ET AL.;
No. 245. UNITED STATES *v.* THOMPSON ET AL.; and
No. 246. UNITED STATES *v.* RISLING ET AL. Court of Claims. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of these applications. *Paul M. Niebell* for the Creek Nation. *Solicitor General Perlman* for the United States. *Claude Pepper* for respondents in Nos. 227 and 247. *Francis M. Goodwin, Sam Clammer, John W. Preston, Frederic A. Baker* and *Mr. Niebell* for respondents in No. 245. *Reginald E. Foster, Thurman Arnold* and *Walton Hamilton* for respondents in No. 246. Reported below: 122 Ct. Cl. 380, 348, 419.

No. 240. CRUMMER COMPANY ET AL. *v.* DUPONT ET AL., TRUSTEES, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or deci-

sion of this application. *Robert J. Pleus, Chris Dixie* and *Joseph P. Lea, Jr.* for petitioners. *Richard W. Ervin,* Attorney General of Florida, *Ralph McLane,* Assistant Attorney General, *Henry P. Adair, Donald Russell, Charles R. Scott* and *H. M. Voorhis* for respondents. Reported below: 196 F. 2d 468.

No. 267. PARIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Arthur J. Mandell* for petitioner. *Price Daniel,* Attorney General of Texas, and *Calvin B. Garwood, Jr.,* Assistant Attorney General, for respondent. Reported below: 156 Tex. Cr. R. ——, 249 S. W. 2d 217.

No. 271. WILD, ADMINISTRATRIX, *v.* ATLANTIC REFINING CO. ET AL. C. A. 3d Cir. Petition for rehearing on petition for extension of time denied. Certiorari also denied. *Lois G. Forer* for petitioner. *Hugh Lynch, Jr.* for the Atlantic Refining Co., respondent. Reported below: 195 F. 2d 151.

No. 284. BARBER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 197 F. 2d 815.

No. 27, Misc. PADILLA *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* for respondent. Reported below: 196 F. 2d 881.

No. 54, Misc. SLUSSER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 75, Misc. DESSAUER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Edmund G. Brown,* Attorney General of California, *Frank W. Richards* and *Stanford D. Herlick* for respondent. Reported below: 38 Cal. 2d 547, 241 P. 2d 238.

No. 76, Misc. KIRKLAND *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* for respondent. Reported below: 196 F. 2d 219.

No. 105, Misc. JACKSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William E. Owen* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 91 U. S. App. D. C. 60, 198 F. 2d 497.

No. 111, Misc. NIEMOTH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 112, Misc. ELLIOTT *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 113, Misc. WAGNER *v.* ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 119, Misc. BROUSSARD *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 120, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 412 Ill. 109, 105 N. E. 2d 766.

No. 123, Misc. MEDFORD *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 412 Ill. 136, 105 N. E. 2d 746.

No. 124, Misc. GEIGER *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Middle District. Certiorari denied. Reported below: 371 Pa. 230, 89 A. 2d 495.

No. 134, Misc. ASH *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *E. Guy Hammond* for petitioner. Reported below: 157 Ohio St. 512, 105 N. E. 2d 867.

No. 137, Misc. VOLTZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 196 F. 2d 298.

No. 139, Misc. BISHOP *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 141, Misc. SPRADING *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward Bennett Williams* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 91 U. S. App. D. C. 417, 198 F. 2d 528.

No. 143, Misc. O'BRIEN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 249 S. W. 2d 433.

No. 149, Misc. COSSENTINO *v.* NEW YORK. Supreme Court of New York, Appellate Division, Second Department. Certiorari denied. Reported below: 279 App. Div. 1031, 113 N. Y. S. 2d 238.

No. 150, Misc. NOR WOODS *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied.

No. 155, Misc. LUSE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 158, Misc. CARNEY *v.* ANDERSON ET AL. Supreme Court of Mississippi. Certiorari denied. Reported below: 214 Miss. 504, 59 So. 2d 262.

No. 161, Misc. IN RE ESTATE OF GARRETT. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 371 Pa. 284, 89 A. 2d 531.

No. 133, Misc. PAONESSA *v.* NEW YORK. Petition for writ of certiorari to the Court of Appeals of New York denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). *Stephen Bienieck* for petitioner. *Burton C. Meighan* for respondent. Reported below: 304 N. Y. 560, 107 N. E. 2d 68.

Rehearing Denied. (*See No. 271, supra.*)

OCTOBER 27, 1952.

Per Curiam Decisions.

No. 13. UNITED STATES *v.* BELL AIRCRAFT CORP. Certiorari, 343 U. S. 913, to the Court of Claims. Argued October 16, 1952. Decided October 27, 1952. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Paul A. Sweeney* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Baldridge* and *Morton Hollander*. *Howard C.*

Westwood argued the cause for respondent. With him on the brief were *Ansley W. Sawyer* and *W. Crosby Roper, Jr.* *John Lord O'Brian* was also of counsel for respondent. Reported below: 120 Ct. Cl. 398, 100 F. Supp. 661.

No. 24. GULF RESEARCH & DEVELOPMENT CO. ET AL. *v.* LEAHY, U. S. DISTRICT JUDGE, ET AL. Certiorari, 343 U. S. 925, to the United States Court of Appeals for the Third Circuit. Argued October 21, 1952. Decided October 27, 1952. *Per Curiam:* The judgment is affirmed by an equally divided Court. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *Leonard S. Lyon* argued the cause for petitioners. With him on the brief were *Richard E. Lyon* and *Thomas Cooch.* *Worthington Campbell* argued the cause for respondents. With him on the brief were *E. Ennalls Berl* and *Mark N. Donohue.* Reported below: 193 F. 2d 302.

No. 25. CARDOX CORPORATION *v.* C-O-TWO FIRE EQUIPMENT CO. Certiorari, 343 U. S. 925, to the United States Court of Appeals for the Seventh Circuit. Argued October 21–22, 1952. Decided October 27, 1952. *Per Curiam:* The judgment is affirmed by an equally divided Court. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *George I. Haight* argued the cause for petitioner. With him on the brief were *Andrew J. Dallstream* and *Frederic H. Stafford.* *R. Morton Adams* argued the cause for respondent. With him on the brief were *Irving Herriott* and *Edward T. Connors.* Reported below: 194 F. 2d 410.

No. 304. OKLAHOMA CITY-ADA-ATOKA RAILWAY CO. ET AL. *v.* OKLAHOMA ET AL. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *R. Sturgis Ingersoll* and

James D. Gibson for the Oklahoma City-Ada-Atoka Railway Co.; and *E. G. Nahler* and *A. J. Baumann* for the St. Louis-San Francisco Railway Co., appellants. *Stephen H. Hart* for appellees. Reported below: 207 Okla. 50, 248 P. 2d 1005.

No. 321. KORNFEIND, DOING BUSINESS AS CHICAGO-NEBRASKA MOTOR EXPRESS, *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Joseph E. Keller* for appellant. *Solicitor General Perlman* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees.

Miscellaneous Orders.

Nos. 132, 166 and 167, Misc. IN RE FLETCHER. The papers herein are stricken. THE CHIEF JUSTICE took no part in the consideration or decision of this question.

No. 146, Misc. DREXEL *v.* OHIO ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 156, Misc. WILLIAMS *v.* HUMPHREY, WARDEN, ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 160, Misc. STARNES *v.* SWYGERT, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 293. UNEXCELLED CHEMICAL CORP. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *George Morris Fay* for petitioner. *Acting Solicitor General*

Stern filed a memorandum for the United States stating that the Government does not oppose the granting of the petition. Reported below: 196 F. 2d 264.

No. 318. NATIONAL LABOR RELATIONS BOARD *v.* ROCKAWAY NEWS SUPPLY CO., INC. C. A. 2d Cir. Certiorari granted. *Acting Solicitor General Stern* and *George J. Bott* for petitioner. *Harry S. Bandler* and *Julius Kass* for respondent. Reported below: 197 F. 2d 111.

No. 320. STONE *v.* NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. Supreme Court of Missouri. Certiorari granted. *Tyree C. Derrick* and *Karl E. Holderle, Jr.* for petitioner. Reported below: 249 S. W. 2d 442.

No. 322. POPE ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO. Supreme Court of Georgia. Certiorari granted. Counsel are requested to discuss in their briefs and on oral argument the question whether the judgment sought to be reviewed is final within the meaning of 28 U. S. C. § 1257. *Richard M. Maxwell* and *Thomas J. Lewis* for petitioners. *Charles Cook Howell* and *Douglas W. Matthews* for respondent. Reported below: 209 Ga. 187, 71 S. E. 2d 243.

Certiorari Denied. (*See also No. 156, Misc., supra.*)

No. 233. BURNS ET AL. *v.* CAROLINA POWER & LIGHT CO. C. A. 4th Cir. Certiorari denied. *H. Wayne Unger* for petitioners. *Charles F. Rouse* and *A. Y. Arledge* for respondent. Reported below: 193 F. 2d 525.

No. 243. SANSON HOSIERY MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *George M. Ethridge* for petitioner. *Acting So-*

licitor General Stern, George J. Bott, David P. Findling, Mozart G. Ratner and *Bernard Dunau* for respondent. Reported below: 195 F. 2d 350.

No. 299. JACOBY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Halsey Sayles* for petitioner. *Robert O. Campbell* for respondent. Reported below: 304 N. Y. 33, 105 N. E. 2d 613.

No. 306. BATEN *v.* NONA-FLETCHER MINERAL CO.; and

No. 307. BOWERS ET AL. *v.* NONA-FLETCHER MINERAL CO. C. A. 5th Cir. Certiorari denied. *G. D. Baten, pro se.* Petitioner Bowers, *pro se. W. D. Gordon, pro se,* petitioner in No. 307. *Will E. Orgain* for respondent. Reported below: 198 F. 2d 629.

No. 309. ELLER, ADMINISTRATOR, *v.* CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. C. A. 6th Cir. Certiorari denied. *Thomas M. Cooley, II* for petitioner. *Carl M. Jacobs* and *J. Craig Bradley* for respondent. Reported below: 197 F. 2d 652.

No. 310. TRAMAGLINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Peter L. F. Sabbatino* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 197 F. 2d 928.

No. 311. WILLIAMS *v.* PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN VIRGINIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Austin F. Canfield, Clarence E. Martin* and *Clarence E. Martin, Jr.* for petitioner. *Armistead L. Boothe* for respondent. Reported below: 91 U. S. App. D. C. 69, 198 F. 2d 595.

No. 312. Borough of Little Ferry *v.* Bergen County Sewer Authority. Supreme Court of New Jersey. Certiorari denied. *Alfred W. Kiefer* for petitioner. *Walter H. Jones* for respondent. Reported below: 9 N. J. 536, 89 A. 2d 18.

No. 315. United States *v.* Adams Packing Association, Inc. et al. C. A. 5th Cir. Certiorari denied. *Acting Solicitor General Stern* for the United States. *G. L. Reeves* for respondents. Reported below: 197 F. 2d 33.

No. 316. Nabors, doing business as W. C. Nabors Co., *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Martin Dies* and *L. J. Benckenstein* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Mozart G. Ratner* and *Samuel M. Singer* for respondent. Reported below: 196 F. 2d 272.

No. 317. Whittington *v.* Moore-McCormack Lines, Inc. C. A. 2d Cir. Certiorari denied. *Charles Andrews Ellis* for petitioner. *John P. Smith* and *Albert P. Thill* for respondent. Reported below: 196 F. 2d 295.

No. 319. Roberts Dairy Co. *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. *Joseph J. O'Connell, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Lyon, Ellis N. Slack, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 195 F. 2d 948.

No. 323. Balduff et al. *v.* Ohio Turnpike Commission et al. Supreme Court of Ohio. Certiorari denied. *Arthur M. Sebastian* for petitioners. *Henry J. Crawford,*

Frank Harrison and *John Lansdale, Jr.* for the Ohio Turnpike Commission, respondent. Reported below: 158 Ohio St. 168, 107 N. E. 2d 345.

No. 325. Wooton et al. *v.* McWilliams, Trustee in Bankruptcy. C. A. 5th Cir. Certiorari denied. *Seymour Krieger* for petitioners. *T. C. Hannah* and *M. M. Roberts* for respondent. Reported below: 197 F. 2d 152.

No. 326. Glenn L. Martin Nebraska Co. *v.* Culkin et al. C. A. 8th Cir. Certiorari denied. *J. A. C. Kennedy* and *George L. DeLacy* for petitioner. *E. K. McDermott* for respondents. Reported below: 197 F. 2d 981.

No. 327. Kinston Tobacco Board of Trade, Inc. et al. *v.* Liggett & Myers Tobacco Co. et al. Supreme Court of North Carolina. Certiorari denied. *Jesse A. Jones* for petitioners. *Bethuel M. Webster* and *Francis H. Horan* for the Liggett & Myers Tobacco Co.; *James Mullen, Walter E. Rogers* and *Albion Dunn* for the Kinston Tobacco Co., Inc.; *Horace G. Hitchcock* and *Victor S. Bryant* for American Suppliers, Inc.; and *William A. Lucas* for the Imperial Tobacco Co., Ltd., respondents. Reported below: 235 N. C. 737, 71 S. E. 2d 21.

No. 313. Davidson *v.* United States. C. A. 9th Cir. Certiorari denied. *Clifton Hildebrand* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 197 F. 2d 817.

No. 328. Centracchio *v.* Garrity, U. S. Attorney. C. A. 1st Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this application. *Bolling R. Powell, Jr.* for petitioner. *Acting*

Solicitor General Stern, Assistant Attorney General Lyon, Ellis N. Slack and *John Lockley* for respondent. Reported below: 198 F. 2d 382.

No. 12, Misc. HASSON *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* for respondent. Reported below: 195 F. 2d 917.

No. 70, Misc. BYERS ET AL. *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 197 F. 2d 521.

No. 78, Misc. KUIKEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 196 F. 2d 223.

No. 91, Misc. CHRONISTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 196 F. 2d 1019.

No. 101, Misc. SELLERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Anthony P. Nugent* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 197 F. 2d 151.

No. 121, Misc. ROBINSON *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for respondent. Reported below: 197 F. 2d 633.

No. 122, Misc. MARELIA *v.* BURKE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 197 F. 2d 856.

No. 136, Misc. DUNBAR *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 142, Misc. PURCILLA ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 144, Misc. BOWEN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 90 A. 2d 174.

No. 151, Misc. DEBRUHL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* and *Frank D. Reeves* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 91 U. S. App. D. C. 125, 199 F. 2d 175.

No. 152, Misc. BANKS *v.* NATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS OF AMERICA, INC. C. A. 5th Cir. Certiorari denied. *J. Tom Watson* for petitioner. *J. Albert Woll, James A. Glenn, Herbert S. Thatcher* and *John R. Foley* for respondent. Reported below: 196 F. 2d 428.

No. 163, Misc. CALLAHAN *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Oliver A. Seaver* for petitioner. Reported below: 209 Ga. 211, 71 S. E. 2d 86.

No. 165, Misc. SCHULTZ *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 170, Misc. O'DWYER *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 171, Misc. SPENCER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern* for the United States. Reported below: See 177 F. 2d 370.

No. 174, Misc. ALLEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William H. Collins* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 91 U. S. App. D. C. 197, 202 F. 2d 329.

No. 175, Misc. NORRED *v.* CALIFORNIA. District Court of Appeal of California, First District. Certiorari denied. Reported below: 110 Cal. App. 2d 492, 243 P. 2d 126.

No. 177, Misc. CARPENTER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 179, Misc. WASHINGTON *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 181, Misc. BEASON *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 186, Misc. CAMPBELL *v.* CLAUDY, WARDEN, ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 118, Misc. DUBOIS *v.* MOSSEY ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would grant certiorari and reverse this

judgment on the ground that petitioner has been denied a trial by jury which the Seventh Amendment to the Constitution is intended to guarantee. *Walter L. Clements* for petitioner. *Charles C. Collins* for the State Mutual Farm Ins. Co., respondent. Reported below: 195 F. 2d 56.

NOVEMBER 10, 1952.

Per Curiam Decisions.

No. 7. GORDON, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, *v.* HEIKKINEN. Certiorari, 343 U. S. 903, to the United States Court of Appeals for the Eighth Circuit. *Per Curiam:* The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition for writ of habeas corpus upon the ground that the cause is moot. *Acting Solicitor General Stern* for petitioner. *Blanch Freedman* for respondent. Reported below: 190 F. 2d 16.

No. 335. ASHTON POWER WRECKER EQUIPMENT CO., INC. *v.* MICHIGAN ET AL. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). *Frederic T. Harward* for appellant. *Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for appellees. Reported below: 332 Mich. 432, 52 N. W. 2d 174.

No. 343. CITY OF ATLANTA *v.* ANGLIN ET AL. Appeal from the Supreme Court of Georgia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *J. C. Mur-*

phy and *Henry L. Bowden* for appellant. *Welborn B. Cody* for the Board of Trustees of the Firemen's Pension Fund of Atlanta, appellee. Reported below: 209 Ga. 170, 71 S. E. 2d 419.

No. 353. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Nye F. Morehouse* and *P. F. Gault* for appellant. *Acting Solicitor General Stern* and *Allen Crenshaw* for the United States and the Interstate Commerce Commission; *William E. Torkelson* for the Public Service Commission of Wisconsin; *Walter J. Mattison* and *Harry G. Slater* for the City of Milwaukee; and *M. L. Bluhm* for the Chicago, Milwaukee, St. Paul & Pacific Railroad Co., appellees.

No. 358. COPPERWELD STEEL CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Pennsylvania. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set down for argument. *Elliott W. Finkel* and *Maurice J. Mahoney* for the Copperweld Steel Co.; and *Anthony P. Donadio* for the Baltimore & Ohio Railroad Co., appellants. *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp* and *Ralph S. Spritzer* for the United States; and *Allen Crenshaw* for the Interstate Commerce Commission, appellees. Reported below: 106 F. Supp. 283.

No. 387. MAHONEY *v.* PAROLE BOARD OF NEW JERSEY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal

is dismissed for the want of a substantial federal question. *Samuel Kagle* for appellant. *Theodore D. Parsons,* Attorney General of New Jersey, and *Eugene T. Urbaniak,* Deputy Attorney General, for appellee. Reported below: 10 N. J. 269, 90 A. 2d 8.

No. 128, Misc. VETTERLI *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court for resentencing without taking into consideration defendant's failure to testify. *Robert W. Kenny* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Robert W. Ginnane* and *Robert G. Maysack* for the United States. Reported below: 198 F. 2d 291.

Miscellaneous Orders.

No. 6, Original. UNITED STATES *v.* CALIFORNIA. The report of the Special Master dated October 14, 1952, is received and ordered filed. Exceptions, if any, to the Report of the Special Master may be filed by the parties on or before January 9, 1953. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this question.

No. 238. NATIONAL LABOR RELATIONS BOARD *v.* GAMBLE ENTERPRISES, INC. Certiorari, 344 U. S. 814, to the United States Court of Appeals for the Sixth Circuit. The motion of Local No. 24, American Federation of Musicians, for leave to intervene is denied. *Henry Kaiser, Gerhard P. Van Arkel* and *Eugene Gressman* were on the motion to intervene. Reported below: 196 F. 2d 61.

No. 182, Misc. GEACH *v.* CHIEF JUSTICE OF CRIMINAL COURT OF COOK COUNTY, ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

No. 184, Misc. DUTTON *v.* RAGEN, WARDEN. Application denied.

No. 201, Misc. BLUME *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (*See also No. 128, Misc., supra.*)

No. 308. DALEHITE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Thomas Fletcher, Austin Y. Bryan, Jr., Neth L. Leachman, T. E. Mosheim* and *John R. Brown* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Baldridge, Paul A. Sweeney, Morton Liftin, Massillon M. Heuser* and *Eberhard P. Deutsch* for the United States. Reported below: 197 F. 2d 771.

No. 413. BOLLING ET AL. *v.* SHARPE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *George E. C. Hayes, James M. Nabrit, Jr., George M. Johnson* and *Herbert O. Reid, Jr.* for petitioners.

No. 86, Misc. ORLOFF *v.* WILLOUGHBY, COMMANDANT. C. A. 9th Cir. Certiorari granted. The motion for leave to file brief of Committee to Prevent Abuse of Doctors' Draft Act, as *amicus curiae,* is denied. *David Rein* for petitioner. *Philip B. Perlman,* then Solicitor General, and *Acting Solicitor General Stern* for respondent. Reported below: 195 F. 2d 209.

Certiorari Denied.

No. 292. GEOTECHNICAL CORPORATION *v.* PURE OIL CO. C. A. 5th Cir. Certiorari denied. *Selim B. Lemle* for petitioner. Reported below: 196 F. 2d 199.

No. 305. ATLANTIC COAST LINE RAILROAD CO. *v.* PIDD. C. A. 5th Cir. Certiorari denied. *Charles Cook Howell* and *G. L. Reeves* for petitioner. *Olin E. Watts* for respondent. Reported below: 197 F. 2d 153.

No. 329. COSTELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *George Wolf* and *Jacob W. Friedman* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 198 F. 2d 200.

No. 332. CENTRAL CUBA SUGAR CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Robert A. Littleton* and *Myles A. Walsh* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Lyon, Ellis N. Slack, Lee A. Jackson* and *Hilbert P. Zarky* for respondent. Reported below: 198 F. 2d 214.

No. 333. THERIOT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Robert Ash* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Lyon, Ellis N. Slack* and *S. Dee Hanson* for respondent. Reported below: 197 F. 2d 13.

No. 334. GASWAY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Gray Thoron* for petitioner. *Price Daniel,* Attorney General of Texas, and *Calvin B. Garwood, Jr.,* Assistant Attorney General, for respondent. Reported below: —— Tex. Cr. R. ——, 248 S. W. 2d 942.

No. 337. Western Air Lines, Inc. *v.* Civil Aeronautics Board et al. C. A. 9th Cir. Certiorari denied. *Hugh W. Darling* for petitioner. *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp* and *Ralph S. Spritzer* for the Civil Aeronautics Board; and *Albert F. Grisard* for the Bonanza Air Lines, Inc., respondents. Reported below: 196 F. 2d 933.

No. 338. A. M. Collins & Co. et al. *v.* Panama Railroad Co. C. A. 5th Cir. Certiorari denied. *John O. Collins* for petitioners. *Paul M. Runnestrand* for respondent. Reported below: 197 F. 2d 893.

No. 339. Monticello Tobacco Co., Inc. *v.* American Tobacco Co. et al. C. A. 2d Cir. Certiorari denied. *Philip Handelman* and *Walter H. Schulman* for petitioner. *Horace G. Hitchcock* for the American Tobacco Co. et al.; and *Bethuel M. Webster* and *Francis H. Horan* for Liggett & Myers Tobacco Co. et al., respondents. Reported below: 197 F. 2d 629.

No. 345. Dickinson *v.* Burnham et al. C. A. 2d Cir. Certiorari denied. *Samuel Hershenstein* for petitioner. *Myron Scott* for respondents. Reported below: 197 F. 2d 973.

No. 346. Charles Peckat Manufacturing Co. *v.* Jarecki, Collector of Internal Revenue. C. A. 7th Cir. Certiorari denied. *John E. Hughes* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Lyon, Ellis N. Slack, A. F. Prescott* and *Joseph F. Goetten* for respondent. Reported below: 196 F. 2d 849.

No. 349. Downey *v.* Beck, Administrator. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Thomas S. Tobin* for respondent. Reported below: 198 F. 2d 626.

No. 350. Puerto Rico *v.* Cementerio Buxeda, Inc. C. A. 1st Cir. Certiorari denied. *Victor Gutierrez-Franqui,* Attorney General of Puerto Rico, *J. B. Fernandez-Badillo,* Sub-Attorney General, and *Jaime J. Saldaña,* Assistant Attorney General, for petitioner. Reported below: 196 F. 2d 177.

No. 351. United Construction Workers et al. *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. *Yelverton Cowherd, Hillis Townsend* and *M. E. Boiarsky* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Mozart G. Ratner* and *Bernard Dunau* for respondent. Reported below: 198 F. 2d 391.

No. 352. Marpes *v.* United States. C. A. 3d Cir. Certiorari denied. *Joseph A. Rossi* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 198 F. 2d 186.

No. 355. Cooper *v.* Cooper. Court of Appeals of Kentucky. Certiorari denied. *Leslie W. Morris* for petitioner. *Simeon S. Willis* for respondent. Reported below: 248 S. W. 2d 702.

No. 356. LaReau, Administrator, *v.* Jones, Administratrix, et al. C. A. 7th Cir. Certiorari denied. *Ralph F. Berlow* for petitioner. *Harold E. Marks* for Jones, respondent. Reported below: 196 F. 2d 852.

No. 359. Eunice Rice Milling Co. *v.* Employers Mutual Liability Insurance Co. C. A. 5th Cir. Certiorari denied. *LeDoux R. Provosty* for petitioner. *R. Emmett Kerrigan* for respondent. Reported below: 198 F. 2d 613.

No. 360. Atlantic Coast Line Railroad Co. *v.* Chance. C. A. 4th Cir. Certiorari denied. *Collins Denny, Jr., J. M. Townsend, M. V. Barnhill, Jr.* and *Charles Cook Howell* for petitioner. *Oliver W. Hill, Martin A. Martin* and *Spottswood W. Robinson, III* for respondent. Reported below: 198 F. 2d 549.

No. 361. Jonikas *v.* United States. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 197 F. 2d 675.

No. 362. Nancy Ann Storybook Dolls, Inc. *v.* Dollcraft Company et al. C. A. 9th Cir. Certiorari denied. *William G. MacKay* for petitioner. *Oscar A. Mellin* and *Jack E. Hursh* for respondents. Reported below: 197 F. 2d 293.

No. 363. Walker *v.* United States. C. A. 2d Cir. Certiorari denied. *Peter L. F. Sabbatino* and *Thomas J. Todarelli* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 197 F. 2d 287.

No. 369. United States *v.* McConville, Administratrix. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Stern* for the United States. *Copal Mintz* for respondent. Reported below: 197 F. 2d 680.

No. 372. Rice et al. *v.* Sayers et al. C. A. 10th Cir. Certiorari denied. *Emmet A. Blaes* for petitioners. *Harold R. Fatzer,* Attorney General of Kansas, and *James P. Mize* for respondents. Reported below: 198 F. 2d 724.

No. 283. GORDON *v.* GORDON. Supreme Court of Florida. Certiorari denied. *Bernard F. Garvey* for petitioner. *S. P. Robineau* for respondent. Reported below: 59 So. 2d 40.

No. 298. ZEPHYR AIRCRAFT CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Loring M. Black* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 122 Ct. Cl. 523, 104 F. Supp. 990.

No. 331. HINES *v.* CITY OF MAYSVILLE. Court of Appeals of Kentucky. Certiorari denied. *James A. Cobb* and *George E. C. Hayes* for petitioner. *M. J. Hennessey* for respondent. Reported below: 249 S. W. 2d 23.

No. 342. DAVENA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. M. Mull, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Lyon, Ellis N. Slack* and *John Lockley* for the United States. Reported below: 198 F. 2d 230.

No. 344. MARR, DOING BUSINESS AS MARR DUPLICATOR CO., *v.* A. B. DICK CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Edward D. Bolton* and *M. Neil Andrews* for petitioner. *Charles A. Horsky, Wilbur R. Lester* and *Bruce Bromley* for respondent. Reported below: 197 F. 2d 498.

No. 347. MILLER *v.* E. I. DUPONT DE NEMOURS & CO. Supreme Court of Oklahoma. Certiorari denied. MR. JUSTICE JACKSON took no part in the consideration or

decision of this application. *Jack L. Rorschach* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Baldridge, James L. Morrisson* and *Samuel D. Slade* for respondent. Reported below: 206 Okla. 488, 244 P. 2d 810.

No. 114, Misc. ALEXANDER *v.* UNITED STATES. Court of Claims. Certiorari denied. Reported below: 122 Ct. Cl. 789.

No. 130, Misc. CLOSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 198 F. 2d 144.

No. 145, Misc. PIZZO, ADMINISTRATOR, *v.* GEOTECHNICAL CORPORATION. C. A. 5th Cir. Certiorari denied. *Milton C. Grace* for petitioner. Reported below: 196 F. 2d 199.

No. 148, Misc. SALVAGGIO *v.* BARNETT ET AL. Court of Civil Appeals of Texas, First Judicial District. Certiorari denied. *Hayden C. Covington* for petitioner. Reported below: 248 S. W. 2d 244.

No. 154, Misc. EX PARTE HAYSLIP. Supreme Court of Tennessee, Middle Division. Certiorari denied. Reported below: 193 Tenn. 643, 249 S. W. 2d 882.

No. 162, Misc. SCOTT ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William E. Owen* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 91 U. S. App. D. C. 232, 202 F. 2d 354.

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No. 169, Misc. KENDALL *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. Reported below: 111 Cal. App. 2d 204, 244 P. 2d 418.

No. 172, Misc. BERG *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 173, Misc. LEWIS *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *James J. Laughlin* for petitioner. Reported below: 193 Va. 612, 70 S. E. 2d 293.

No. 180, Misc. BASHAW *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 183, Misc. OKULCZYK *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 185, Misc. EAGLE *v.* CHERNEY ET AL. Court of Appeals of New York. Certiorari denied.

No. 189, Misc. HENDERSON *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 190, Misc. SCHWIEM *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 191, Misc. PRIESTLY *v.* DONALDSON, POSTMASTER GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl L. Shipley* and *Samuel Resnicoff* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the Postmaster General, respondent. Reported below: 91 U. S. App. D. C. 138, 198 F. 2d 533.

No. 193, Misc. SHOLTER *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 197, Misc. SKELLY *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 200, Misc. THOMAS *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 202, Misc. BAYNE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Earl H. Davis* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 91 U. S. App. D. C. 232, 202 F. 2d 354.

No. 157, Misc. NEWMAN *v.* LOWERY ET AL. Petition for writ of certiorari to the Supreme Court of Ohio denied for the reason that application therefor was not made within the time provided by law, 28 U. S. C. § 2101 (c). Reported below: 157 Ohio St. 463, 105 N. E. 2d 643.

No. 192, Misc. CARENGELLA *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied for the reason that application therefor was not made within the time provided by law. Rule 37 (b)(2) of the Rules of Criminal Procedure. *George F. Callaghan* and *George M. Crane* for petitioner. Reported below: 198 F. 2d 3.

Rehearing Denied.

No. 70. ALGONQUIN GAS TRANSMISSION CO. ET AL. *v.* NORTHEASTERN GAS TRANSMISSION CO. ET AL., *ante*, p. 818. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 73. H. B. Zachry Co. *v.* Terry, *ante,* p. 819;

No. 83. Lichtenstein et al. *v.* Federal Trade Commission, *ante,* p. 819;

No. 91. 58th Street Plaza Theatre, Inc. et al. *v.* Commissioner of Internal Revenue, *ante,* p. 820;

No. 96. Jefferson *v.* Chronicle Publishing Co., *ante,* p. 803; and

No. 254. White *v.* Commissioner of Internal Revenue, *ante,* p. 835. Petitions for rehearing denied.

No. 207. Division 26 of the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America et al. *v.* City of Detroit et al., *ante,* p. 805. Motions for leave to file briefs of American Federation of Labor and Congress of Industrial Organizations, as *amici curiae,* denied. Petitions for rehearing also denied.

No. 503, Misc., October Term, 1951. Hewlett *v.* California, 343 U. S. 981. Motion for extension of time to file brief in support of a second petition for rehearing and motion for leave to file a second petition for rehearing denied.

No. 10, Misc. Cepero *v.* Pan American Airways, Inc., *ante,* p. 840;

No. 54, Misc. Slusser *v.* Ellis, General Manager, Texas Prison System, et al., *ante,* p. 857;

No. 62, Misc. Timmons *v.* United States, *ante,* p. 844;

No. 69, Misc. Golemon *v.* Texas, *ante,* p. 847;

No. 71, Misc. Packwood *v.* Briggs & Stratton Corp. et al., *ante,* p. 844; and

No. 108, Misc. Severa *v.* Borough of Throop et al., *ante,* p. 847. Petitions for rehearing denied.

NOVEMBER 17, 1952.

Per Curiam Decision.

No. 77. W. J. DILLNER TRANSFER CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Pennsylvania. *Per Curiam:* Judgment affirmed. *United States* v. *Tucker Truck Lines,* 344 U. S. 33, decided November 10, 1952. *Ernie Adamson* for appellant. *Daniel W. Knowlton* and *J. Stanley Payne* for the United States and the Interstate Commerce Commission, appellees. Reported below: 101 F. Supp. 506.

Miscellaneous Orders.

No. 113. TINDER *v.* UNITED STATES. It is ordered that William W. Koontz, Esq., of Alexandria, Va., a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 206, Misc. CHAPMAN *v.* MICHIGAN. Motion for leave to file petition for writ of habeas corpus and petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 188, Misc. FLECK *v.* SWOPE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (*See also No. 100, ante, p. 86.*)

No. 52. TERRY ET AL. *v.* ADAMS ET AL. C. A. 5th Cir. Certiorari granted. *Ira J. Allen* for petitioners. Reported below: 193 F. 2d 600.

No. 368. DE LA RAMA STEAMSHIP CO., INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to the

question of the jurisdiction of the District Court. *Roscoe H. Hupper* for petitioner. *Acting Solicitor General Stern* filed a memorandum for the United States stating that the Government does not oppose the granting of a writ of certiorari in this case limited to the question of jurisdiction. Reported below: 198 F. 2d 182.

Certiorari Denied. (*See also No. 206, Misc., supra.*)

No. 185. MILLIKEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *John W. Burke, Jr.* for petitioner. *Solicitor General Perlman* filed a memorandum for respondent. Reported below: 196 F. 2d 135.

No. 210. DUVEEN BROTHERS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Hugh Satterlee* and *Rollin Browne* for petitioner. *Solicitor General Perlman* filed a memorandum for respondent. Reported below: 197 F. 2d 118.

No. 364. UNITED MINE WORKERS OF AMERICA, DISTRICT 31, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *M. E. Boiarsky* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Mozart G. Ratner* and *Fannie M. Boyls* for respondent. Reported below: 198 F. 2d 389.

No. 366. VERDERBER *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Milton Carr Ferguson* for petitioner.

No. 367. SPRINGFIELD INSTITUTION FOR SAVINGS ET AL. *v.* WORCESTER FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. Supreme Judicial Court of Massachusetts. Certio-

rari denied. *Henry P. Fielding,* Assistant Attorney General of Massachusetts, and *Richard Wait* for petitioners. *Charles B. Rugg* for respondents. Briefs of *amici curiae* supporting the petition were filed by *Timothy J. Donovan* and *John P. Clair* for the Department of Banks of Massachusetts; and *Fred N. Oliver* and *M. F. McCarthy* for the National Association of Mutual Savings Banks. Reported below: 329 Mass. 184, 107 N. E. 2d 315.

No. 370. Tisneros *v.* Chicago & North Western Railway Co. C. A. 7th Cir. Certiorari denied. *William C. Wines* for petitioner. *Lowell Hastings* and *Drennan J. Slater* for respondent. Reported below: 197 F. 2d 466.

No. 377. Oyster Shell Products Corp., Inc. *v.* United States. C. A. 5th Cir. Certiorari denied. *John E. Jackson* and *George Link, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General McInerney* and *Roger P. Marquis* for the United States. Reported below: 197 F. 2d 1022.

No. 4, Misc. Grass *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Ivan A. Elliott,* Attorney General of Illinois, for respondent.

No. 87, Misc. Rolland *v.* Michigan. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se. Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 99, Misc. Duncan *v.* United States. C. A. 5th Cir. Certiorari denied. *Wm. Schley Howard* for peti-

tioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 197 F. 2d 935.

No. 147, Misc. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 164, Misc. FELORNIA ET AL. *v.* YOUNG ET AL. Supreme Court of Utah. Certiorari denied. *O. A. Tangren* for petitioners. *Henry D. Moyle* for respondents. Reported below: —— Utah ——, 244 P. 2d 862.

No. 168, Misc. BAILEY *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Martin A. Martin, Oliver W. Hill, William Davis Butts* and *Spottswood W. Robinson, III* for petitioner. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *Frederick T. Gray*, Assistant Attorney General, for respondent. Reported below: 193 Va. 814, 71 S. E. 2d 368.

No. 178, Misc. TARTAR *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 194, Misc. GREEN *v.* GORDON ET AL. Supreme Court of California. Certiorari denied. *Elizabeth Cassidy* for petitioner. Reported below: 39 Cal. 2d 230, 246 P. 2d 38.

No. 195, Misc. BEECHER *v.* LEAVENWORTH STATE BANK ET AL. C. A. 9th Cir. Certiorari denied.

No. 198, Misc. HOUSTON *v.* SUPERIOR COURT IN AND FOR THE COUNTY OF BUTTE, CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 203, Misc. ESTES *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 207, Misc. PETROSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 208, Misc. SPARACINO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 209, Misc. WILLIAMS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 210, Misc. MELL *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 135, Misc. CHORAK ET AL. *v.* R. K. O. RADIO PICTURES, INC. ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Alfred C. Ackerson* for petitioners. *Eugene D. Williams* for respondents. Reported below: 196 F. 2d 225.

No. 187, Misc. BERTRAND *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c).

Rehearing Denied.

No. 174. MCGRATH, ATTORNEY GENERAL, *v.* NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES

OF AMERICA ET AL., *ante*, p. 804. Rehearing denied. MR. JUSTICE REED and MR. JUSTICE JACKSON are of the opinion the petition should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 137. BURLINGTON COUNTY BRIDGE COMMISSION ET AL. *v.* DRISCOLL, GOVERNOR;

No. 184. NONGARD ET AL., TRADING AS KETCHAM & NONGARD, ET AL. *v.* DRISCOLL, GOVERNOR; and

No. 188. BELL *v.* DRISCOLL, GOVERNOR, ET AL., *ante*, p. 838. Petitions for rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of these applications.

No. 148. TIDE WATER ASSOCIATED OIL CO. *v.* ROBISON, ON BEHALF OF LOCAL 445, OIL WORKERS INTERNATIONAL UNION, *ante*, p. 804;

No. 189. HARRIS *v.* HARRIS, *ante*, p. 829;

No. 192. TAYLOR *v.* KENTUCKY, *ante*, p. 830;

No. 201. SLENKER ET AL. *v.* GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS, *ante*, p. 830;

No. 260. ARON *v.* SNYDER, SECRETARY OF THE TREASURY, ET AL., *ante*, p. 854;

No. 267. PARIS *v.* TEXAS, *ante*, p. 857;

No. 272. SHELL OIL CO. *v.* WILKIN ET AL., *ante*, p. 854;

No. 326. GLENN L. MARTIN NEBRASKA CO. *v.* CULKIN ET AL., *ante*, p. 866;

No. 82, Misc. PODOLSKI *v.* MICHIGAN, *ante*, p. 845;

No. 116, Misc. MULKEY *v.* MICHIGAN, *ante*, p. 852; and

No. 158, Misc. CARNEY *v.* ANDERSON ET AL., *ante*, p. 860. Petitions for rehearing denied.

No. 111. ROSENBERG ET AL. *v.* UNITED STATES; and No. 112. SOBELL *v.* UNITED STATES, *ante*, p. 838. Motion for leave to file brief of Dr. W. E. B. Dubois and others, as *amici curiae*, denied. Petitions for rehearing denied. Memorandum filed by MR. JUSTICE FRANKFURTER in No. 111. MR. JUSTICE BLACK adheres to his view that the petitions for certiorari should be granted.

MR. JUSTICE FRANKFURTER.

Petitioners are under death sentence, and it is not unreasonable to feel that before life is taken review should be open in the highest court of the society which has condemned them. Such right of review was the law of the land for twenty years. By § 6 of the Act of February 6, 1889, 25 Stat. 655, 656, convictions in capital cases arising under federal statutes were appealable here. But in 1911 Congress abolished the appeal as of right, and since then death sentences have come here only under the same conditions that apply to any criminal conviction in a federal court. (§§ 128, 238, 240 and 241 of the Judicial Code, 36 Stat. 1087, 1133, 1157.)

The Courts of Appeals are charged by Congress with the duty of reviewing all criminal convictions. These are courts of great authority and corresponding responsibility. The Court of Appeals for the Second Circuit was deeply conscious of its responsibility in this case. Speaking through Judge Frank, it said: "Since two of the defendants must be put to death if the judgments stand, it goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal." 195 F. 2d 583, 590.

After further consideration, the Court has adhered to its denial of this petition for certiorari. Misconception regarding the meaning of such a denial persists despite repeated attempts at explanation. It means, and all that

it means is, that there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari. It also deserves to be repeated that the effective administration of justice precludes this Court from giving reasons, however briefly, for its denial of a petition for certiorari. I have heretofore explained the reasons that for me also militate against noting individual votes when a petition for certiorari is denied. See *Chemical Bank & Trust Co.* v. *Group of Institutional Investors,* 343 U. S. 982.

Numerous grounds were urged in support of this petition for certiorari; the petition for rehearing raised five additional questions. So far as these questions come within the power of this Court to adjudicate, I do not, of course, imply any opinion upon them. One of the questions, however, first raised in the petition for rehearing, is beyond the scope of the authority of this Court, and I deem it appropriate to say so. A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of this Court to revise.

NOVEMBER 24, 1952.

Per Curiam Decision.

No. 408. PENN-DIXIE CEMENT CORP. *v.* DICKINSON, COMMISSIONER OF FINANCE AND TAXATION, ET AL. Appeal from the Supreme Court of Tennessee. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Charles C. Moore* for appellant. *Roy H. Beeler,* Attorney General of Tennessee, and *Allison B. Humphreys,* Solicitor General, for appellees. Reported below: 194 Tenn. 412, 250 S. W. 2d 904.

Miscellaneous Orders.

No. 220, Misc. ADAMS *v.* UNITED STATES. Application denied.

No. 237, Misc. KAUFMAN ET AL. *v.* PINE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Irving Moskovitz, Henry G. Fischer, Odell Kominers* and *Seymour Graubard* for petitioners.

No. 243, Misc. NELSON ET AL. *v.* STEWART, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of prohibition or mandamus denied. *Bertram Edises* for petitioners.

Certiorari Granted.

No. 302. DAMERON *v.* BRODHEAD, MANAGER OF REVENUE AND EX OFFICIO TREASURER OF THE CITY AND COUNTY OF DENVER. Supreme Court of Colorado. Certiorari granted. *Acting Solicitor General Stern* for petitioner. *Leonard M. Campbell* and *John C. Banks* for respondent. Reported below: 125 Colo. 477, 244 P. 2d 1082.

No. 448. GEBHART ET AL. *v.* BELTON ET AL. Supreme Court of Delaware. Certiorari granted. *H. Albert Young*, Attorney General of Delaware, for petitioners. *Louis L. Redding* and *Thurgood Marshall* for respondents. Reported below: —— Del. ——, 91 A. 2d 137.

Certiorari Denied.

No. 300. BRANNAN, SECRETARY OF AGRICULTURE, *v.* KASS, TRADING AS BABYLON MILK & CREAM CO. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Stern,*

W. Carroll Hunter and *Neil Brooks* for petitioner. *Harry Polikoff* and *Edgar J. Goodrich* for respondent. Reported below: 196 F. 2d 791.

No. 314. McRae *v.* Woods, Acting Housing Expediter. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, John R. Benney, Ed Dupree, A. M. Edwards* and *Nathan Siegel* for respondent. Reported below: 196 F. 2d 496.

No. 381. American President Lines, Ltd. *v.* Immigration and Naturalization Service et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Welburn Mayock* and *W. S. Mayock* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for respondents.

No. 383. C-O-Two Fire Equipment Co. et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Francis R. Kirkham* for petitioners. *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp* and *Daniel M. Friedman* for the United States. Reported below: 197 F. 2d 489.

No. 385. Western New York Water Co. et al. *v.* Erie County Water Authority. Court of Appeals of New York. Certiorari denied. *Jesse Climenko* for petitioners. *Melvin L. Bong* and *Laurence J. Olmsted* for respondent. Reported below: 304 N. Y. 342, 107 N. E. 2d 479.

No. 397. Ernest, Trustee in Bankruptcy, *v.* Riverview State Bank. C. A. 10th Cir. Certiorari denied. *Wesley E. Brown, Donald C. Martindell* and *William D. P. Carey* for petitioner. *T. M. Lillard* and *N. E. Snyder* for respondent. Reported below: 198 F. 2d 876.

No. 398. Local 333B, United Marine Division of International Longshoremen's Association (A. F. L.), et al. *v.* Virginia ex rel. Virginia Ferry Corp. Supreme Court of Appeals of Virginia. Certiorari denied. *Joseph L. Rauh, Jr.* for petitioners. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *Barron F. Black,* Special Assistant Attorney General, for respondent. Reported below: 193 Va. 773, 71 S. E. 2d 159.

No. 373. Kemble *v.* United States. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion certiorari should be granted. *Lester J. Schaffer* and *William A. Gray* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 198 F. 2d 889.

No. 400. Interstate Commerce Commission et al. *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of this application. *Edward M. Reidy* for the Interstate Commerce Commission, *Windsor F. Cousins* and *Hugh B. Cox* for the Pennsylvania Railroad Co., *Charles P. Reynolds* for the Atlantic Coast Line Railroad Co. et al., *Martin A. Meyer, Jr.* for the Virginian Railway Co., and *A. J. Dixon* for the Southern Railway Co., petitioners. *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp* and *Ralph S. Spritzer* for the United States. Reported below: 91 U. S. App. D. C. 178, 198 F. 2d 958.

No. 153, Misc. Lopez *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *G. C. Mann* for petitioner. *Price Daniel,* Attorney General of Texas, and

V. F. Taylor and *Calvin B. Garwood, Jr.*, Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——, 252 S. W. 2d 701.

No. 205, Misc. JOHNSON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 214, Misc. BOWMAN *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 216, Misc. MALONE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 218, Misc. DALE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 219, Misc. ELLIS *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 177. GAGE *v.* UNITED STATES, *ante*, p. 829;

No. 311. WILLIAMS *v.* PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN VIRGINIA, *ante*, p. 864;

No. 317. WHITTINGTON *v.* MOORE - McCORMACK LINES, INC., *ante*, p. 865; and

No. 140, Misc. FAUBERT *v.* MICHIGAN, *ante*, p. 851. Petitions for rehearing denied.

DECEMBER 8, 1952.

Miscellaneous Orders.

No. 211, Misc. LIZZI *v.* STEELE, WARDEN; and

No. 223, Misc. DUNLAP *v.* STEINER, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 212, Misc. GRAHAM *v.* DOWD, WARDEN, ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 290. WATSON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari granted. *A. Calder Mackay* for petitioners. *Acting Solicitor General Stern* filed a memorandum for respondent stating that the petition for writ of certiorari is not opposed. Reported below: 197 F. 2d 56.

No. 296. ALSTATE CONSTRUCTION CO. *v.* TOBIN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari granted. *Gilbert Nurick* for petitioner. *Acting Solicitor General Stern, William S. Tyson* and *Bessie Margolin* filed a memorandum stating that respondent does not object to the granting of the writ of certiorari in this case. Reported below: 195 F. 2d 577.

No. 410. THOMAS *v.* HEMPT BROTHERS. Supreme Court of Pennsylvania. Certiorari granted. *Henry C. Kessler, Jr.* and *Richard W. Galiher* for petitioner. *Sterling G. McNees* for respondent. Reported below: 371 Pa. 383, 89 A. 2d 776.

Certiorari Denied.

No. 382. TAN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Prew Savoy* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 122 Ct. Cl. 662, 102 F. Supp. 552.

No. 386. DE GUIA ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ernest Schein* for petition-

ers. *Acting Solicitor General Stern* for the United States. Reported below: 122 Ct. Cl. 665.

No. 388. UNITED FRUIT CO. *v.* W. E. HEDGER TRANSPORTATION CORP. C. A. 2d Cir. Certiorari denied. *Harold M. Kennedy* for petitioner. *Alfred B. Nathan* for respondent. Reported below: 198 F. 2d 376.

No. 389. WEATHERS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Philip Donald DeHoff* for petitioner.

No. 399. IN RE VITARI. Supreme Court of Louisiana. Certiorari denied. *Bentley G. Byrnes* for petitioner.

No. 402. WESTERN UNION TELEGRAPH CO. *v.* LESESNE. C. A. 4th Cir. Certiorari denied. *John H. Waters, William G. H. Acheson* and *Edward W. Mullins* for petitioner. Reported below: 198 F. 2d 154.

No. 403. SCHMIDT *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 198 F. 2d 32.

No. 412. DISTRICT OF COLUMBIA *v.* CATHOLIC EDUCATION PRESS, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for petitioner. *George E. Hamilton, Jr.* for respondent. Reported below: 91 U. S. App. D. C. 126, 199 F. 2d 176.

No. 414. UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA-UE ET AL. *v.* OLIVER CORPORATION. C. A. 8th Cir. Certiorari denied. *Arthur Kinoy* and *Frank J. Donner* for petitioners. Reported below: 198 F. 2d 672.

No. 416. GOE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *F. T. Weil* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Lyon, Ellis N. Slack, A. F. Prescott* and *John R. Benney* for respondent. Reported below: 198 F. 2d 851.

No. 417. WESTWOOD PHARMACAL CORP. ET AL. *v.* FIELDING ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. *Moses Lasky* for petitioners. *Earl C. Berger* for respondents. Reported below: 111 Cal. App. 2d 490, 244 P. 2d 968.

No. 418. SOUTHERN PACIFIC CO. *v.* ERICKSEN. Supreme Court of California. Certiorari denied. *Arthur B. Dunne* for petitioner. *Melvin M. Belli* for respondent. Reported below: 39 Cal. 2d 374, 234 P. 2d 279.

No. 419. UNITED BRICK & CLAY WORKERS OF AMERICA ET AL. *v.* DEENA ARTWARE, INC. C. A. 6th Cir. Certiorari denied. *J. Albert Woll, Herbert S. Thatcher, James A. Glenn* and *Joseph E. Finley* for petitioners. *James G. Wheeler* for respondent. Reported below: 198 F. 2d 637.

No. 424. BOORTZ *v.* AMERICAN MOTORIST INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Walter B. Scott* and *W. P. McLean* for petitioner. *B. L. Agerton* for respondent. Reported below: 197 F. 2d 900.

No. 433. PENNSYLVANIA RAILROAD CO. *v.* PURVIS. C. A. 3d Cir. Certiorari denied. *H. Francis DeLone* and *Hugh B. Cox* for petitioner. *Ernest Ray White* for respondent. Reported below: 198 F. 2d 631.

No. 354. BROWN ET AL. *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine, Mort L. Clopton* and *John L. Kearney* for petitioners. *Everett A. Corten* for the Industrial Accident Commission of California, and *Charles C. Collins* for the American Mutual Liability Insurance Co., respondents.

No. 376. OLNEY *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE REED and MR. JUSTICE JACKSON are of the opinion certiorari should be granted. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. *Charles A. Horsky* and *Amy Ruth Mahin* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 123 Ct. Cl. 285, 105 F. Supp. 1005.

No. 213, Misc. BYERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 215, Misc. GRIFFIN *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 221, Misc. COLLINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 222, Misc. DEL'MARMOL *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 225, Misc. HANSEN *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied. Reported below: 262 Wis. 294, 55 N. W. 2d 6.

No. 226, Misc. SIMON *v.* McGEE ET AL. C. A. 9th Cir. Certiorari denied.

No. 227, Misc. TILLMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 228, Misc. SHIELDS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 230, Misc. ST. JOHN *v.* REDNOUR, SUPERINTENDENT, ILLINOIS SECURITY HOSPITAL. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 231, Misc. THOMAS *v.* MILLARD, ATTORNEY GENERAL, ET AL. Supreme Court of Michigan. Certiorari denied.

No. 232, Misc. THOMPSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 413 Ill. 53, 107 N. E. 2d 866.

No. 234, Misc. EDDY *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied.

No. 236, Misc. HARRIS *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 240, Misc. MURPHY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 241, Misc. MULVEY *v.* JACQUES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 199 F. 2d 300.

No. 244, Misc. RHEIM *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 217, Misc. GREEN *v.* BOTT, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c).

Rehearing Denied.

No. 24. GULF RESEARCH & DEVELOPMENT CO. ET AL. *v.* LEAHY, U. S. DISTRICT JUDGE, ET AL., *ante*, p. 861; and

No. 25. CARDOX CORPORATION *v.* C-O-TWO FIRE EQUIPMENT CO., *ante*, p. 861. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications.

No. 51. ARROWSMITH ET AL., EXECUTORS, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 6;

No. 241. MOTORS INSURANCE CORP. ET AL. *v.* ROBINSON, SUPERINTENDENT OF INSURANCE OF OHIO, ET AL., *ante*, p. 803;

No. 329. COSTELLO *v.* UNITED STATES, *ante*, p. 874;

No. 353. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* UNITED STATES ET AL., *ante*, p. 871;

No. 358. COPPERWELD STEEL CO. ET AL. *v.* UNITED STATES ET AL., *ante*, p. 871; and

No. 173, Misc. LEWIS *v.* VIRGINIA, *ante*, p. 880. Petitions for rehearing denied.

DECEMBER 15, 1952.

Per Curiam Decisions.

No. 447. CROSS *v.* TUSTIN ET AL. Appeal from the District Court of Appeal of California, First Appellate District. *Per Curiam:* The appeal is dismissed for the

want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. Reported below: 111 Cal. App. 2d 395, 244 P. 2d 731.

No. 458. NEWTEX STEAMSHIP CORP. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *S. S. Eisen* for appellants. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; *Harold B. Finn* and *John C. White* for the Harris County Houston Ship Channel Navigation District et al.; and *Mr. Finn* and *Warren Price, Jr.* for the Pan-Atlantic Steamship Corporation, appellees. Reported below: 107 F. Supp. 388.

No. 461. UNITED STATES *v.* GROWER-SHIPPERS VEGETABLE ASSOCIATION OF CENTRAL CALIFORNIA ET AL. Appeal from the United States District Court for the Northern District of California. *Per Curiam:* Judgment affirmed. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set down for argument. *Acting Solicitor General Stern* for the United States. *George M. Naus* for appellees.

Miscellaneous Orders.

No. 120. UNITED STATES *v.* CRESCENT AMUSEMENT CO. ET AL. The appeal from the United States District Court for the Middle District of Tennessee is dismissed on motion of counsel for the appellant. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Philip B. Perlman,*

then Solicitor General, and *Solicitor General Cummings* for the United States. *William Waller* for the Crescent Amusement Co. et al.; and *W. H. Mitchell* for the Muscle Shoals Theatres et al., appellees.

No. 233, Misc. California Texas Oil Co., Ltd. et al. *v.* Kirkland, U. S. District Judge. Motion for leave to file petition for writ of mandamus denied. *Leo T. Kissam, Lloyd N. Cutler* and *Albert E. Van Dusen* for the California Texas Oil Co., Ltd., *George S. Leisure* and *Goldthwaite H. Dorr* for the Socony-Vacuum Oil Co., Inc., *John T. Cahill* and *John F. Sonnett* for the Standard Oil Co. of California, *Oscar John Dorwin, S. A. L. Morgan* and *John J. Wilson* for the Texas Company, and *George W. Ray, Jr., John Noble* and *Lowell Wadmond* for the Arabian American Oil Co., movants. *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp, Leonard J. Emmerglick* and *Ralph S. Spritzer* for the United States in opposition.

No. 242, Misc. Williams *v.* Jackson, Warden. Motion for leave to file petition for writ of habeas corpus denied.

No. 253, Misc. Sydow *v.* Golden, U. S. Marshal, et al. Motion for leave to file petition for writ of habeas corpus denied. *Fyke Farmer* for petitioner.

Certiorari Granted.

No. 404. Orvis et al. *v.* McGranery, Attorney General, Successor to the Alien Property Custodian. C. A. 2d Cir. Certiorari granted. Mr. Justice Clark took no part in the consideration or decision of this application. *Donald Marks* for petitioners. *Acting Solici-*

tor General Stern, Assistant Attorney General Kirks, James D. Hill and *George B. Searls* for respondent. Reported below: 198 F. 2d 708.

No. 422. BURNS ET AL. *v.* LOVETT, SECRETARY OF DEFENSE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Robert L. Carter, Frank D. Reeves* and *Thurgood Marshall* for petitioners. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* for respondents. Reported below: 91 U. S. App. D. C. 208, 202 F. 2d 235.

No. 439. LEVINSON ET AL. *v.* DEUPREE, ANCILLARY ADMINISTRATOR. C. A. 6th Cir. Certiorari granted. *Charles E. Lester, Jr.* and *Stephens L. Blakely* for petitioners. *Harry M. Hoffheimer* and *Robert S. Marx* for respondent. Reported below: 199 F. 2d 760.

Certiorari Denied. (*See also No. 447, supra.*)

No. 19. PEREZ *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 401. COX ET AL. *v.* KIRBY LUMBER CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Gilbert T. Adams* and *E. E. Easterling* for petitioners. *Joyce Cox* for respondents. Reported below: 197 F. 2d 812.

No. 406. BULLEN ET AL. *v.* SCOVILLE. C. A. 9th Cir. Certiorari denied. *William Douglas Sellers* for petitioners. *Newton E. Anderson* for respondent. Reported below: 197 F. 2d 1.

No. 415. HODGES *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Stonewall H. Dyer* for petitioner. Reported below: 209 Ga. 283, 71 S. E. 2d 543.

No. 421. California Texas Oil Co., Ltd. et al. *v.* Kirkland, U. S. District Judge. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Leo T. Kissam, Lloyd N. Cutler* and *Albert E. Van Dusen* for the California Texas Oil Co., Ltd., *George S. Leisure* and *Goldthwaite H. Dorr* for the Socony-Vacuum Oil Co., Inc., *John T. Cahill* and *John F. Sonnett* for the Standard Oil Co. of California, *Oscar John Dorwin, S. A. L. Morgan* and *John J. Wilson* for the Texas Company, and *George W. Ray, Jr., John Noble* and *Lowell Wadmond* for the Arabian American Oil Co., petitioners. *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp, Leonard J. Emmerglick* and *Ralph S. Spritzer* for the United States in opposition. Reported below: 91 U. S. App. D. C. 272, 201 F. 2d 177.

No. 437. Razete *v.* United States. C. A. 6th Cir. Certiorari denied. *Harry Kasfir* for petitioner. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 199 F. 2d 44.

No. 3, Misc. Pianezzi *v.* Heinze, Warden. Supreme Court of California. Certiorari denied. Petitioner *pro se. Edmund G. Brown,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent.

No. 6, Misc. Robinson *v.* Louisiana. Supreme Court of Louisiana. Certiorari denied. *Eugene Stanley* for petitioner. Reported below: 221 La. 19, 58 So. 2d 408.

No. 117, Misc. Williamson *v.* Oklahoma. Court of Criminal Appeals of Oklahoma. Certiorari denied. Petitioner *pro se. Mac Q. Williamson,* Attorney General of

Oklahoma, and *Owen J. Watts,* Assistant Attorney General, for respondent.

No. 247, Misc. SQUIRES *v.* RAGEN, WARDEN. Circuit Court of Winnebago County, Illinois. Certiorari denied.

No. 251, Misc. THOMPSON *v.* CRANOR, WARDEN, ET AL. Supreme Court of Washington. Certiorari denied.

Rehearing Denied.

No. 81. AIKEN *v.* RICHARDSON, *ante,* p. 802. Rehearing denied.

No. 344. MARR, DOING BUSINESS AS MARR DUPLICATOR CO., *v.* A. B. DICK CO., *ante,* p. 878. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 158, Misc. CARNEY *v.* ANDERSON ET AL., *ante,* p. 860. Motion for leave to file a second petition for rehearing denied.

DECEMBER 22, 1952.

Per Curiam Decision.

No. 455. NORTHERN PACIFIC RAILWAY CO. ET AL. *v.* MONTANA ET AL. Appeal from the United States District Court for the District of Montana. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court for further proceedings in the light of *King* v. *United States, ante,* p. 254, decided this day. *Louis E. Torinus, Jr., Eldon M. Martin, Elmer B. Collins* and *Marcellus L. Countryman, Jr.* for appellants. *Arnold H. Olsen,* Attorney General of Montana, *H. M. Brickett,* Assistant Attorney General, and *Edwin S. Booth* for appellees. Reported below: 106 F. Supp. 778, 786.

Miscellaneous Orders.

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. It is ordered that John Raeburn Green, Esquire, of St. Louis, Missouri, be, and he is hereby, appointed special master in this cause, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to hold hearings, take such evidence as may be necessary and, with all convenient speed, to submit a report with recommendations relative to the disposition of the questions raised by the pleadings.

The order entered herein on April 28, 1952, 343 U. S. 932, left open the question of the indispensability of the United States as a party for decision after evidence. In hearing the evidence, the master is directed, so far as is practicable, to hear first evidence bearing on the indispensability of the United States, if the United States does not enter its appearance in the case. He is requested to examine and report on that point, if practicable, separately and prior to his report on the other issues, determining particularly whether effective relief could be granted petitioner without affecting the interest of the United States. The master shall give like consideration to any other allegation of indispensability made by any party defendant.

The master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct. If the appointment herein made of a master is not accepted, or if the place becomes vacant during the recess of the Court, THE

CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that the present record establishes the indispensability of the United States and requires the dismissal of the complaint.

Price Daniel, Attorney General of Texas, *Jesse P. Luton, Jr.* and *K. B. Watson,* Assistant Attorneys General, and *Eugene T. Edwards* for plaintiff, were on the motion for the appointment of a special master. *Joe L. Martinez,* Attorney General, and *Fred E. Wilson,* Special Assistant Attorney General, for the State of New Mexico, and *Martin A. Threet, D. A. Macpherson, Jr.* and *Jean S. Breitenstein* for the Middle Rio Grande Conservancy District et al., defendants, in opposition.

No. 224, Misc. JERONIS *v.* JACQUES, WARDEN. C. A. 6th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus and petition for allowance of an appeal also denied.

No. 263, Misc. GIBSON *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 265, Misc. EX PARTE MAYNARD. Motion for leave to file petition for writs of habeas corpus and certiorari denied.

No. 267, Misc. BOZELL *v.* WELCH, SUPERINTENDENT OF LORTON REFORMATORY, ET AL.; and

No. 268, Misc. SPRADLING *v.* EIDSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 276, Misc. KNETZER *v.* SCHULTZ, ACTING U. S. MARSHAL. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion that the application should be transferred under 28 U. S. C. § 2241 (b). *Donald H. Dalton* and *Manuel M. Wiseman* for petitioner.

No. 271, Misc. UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS ET AL. Motion for leave to file petition for writ of mandamus dismissed on motion of counsel for the petitioner. *Acting Solicitor General Stern* for the United States.

Certiorari Denied. (*See also Misc. Nos. 224, 263 and 265, supra.*)

No. 102. BRATBURD ET AL. *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *T. Emmett McKenzie* for petitioners. *Hall Hammond,* Attorney General of Maryland, and *Kenneth C. Proctor,* Assistant Attorney General, for respondent. Reported below: —— Md. ——, 88 A. 2d 446.

No. 357. GORDON WOODROFFE CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *John G. Jackson* for petitioner. *Solicitor General Cummings, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 122 Ct. Cl. 723, 104 F. Supp. 984.

No. 407. KROSS *v.* CALIFORNIA. Superior Court of California, Los Angeles County. Certiorari denied. *Irving I. Erdheim* for petitioner. *Edmund G. Brown,* Attorney General of California, *Frank W. Richards,*

Assistant Attorney General, and *Stanford D. Herlick,* Deputy Attorney General, for respondent. Reported below: See 112 Cal. App. 2d 602, 247 P. 2d 44.

No. 431. Austrian et al., Trustees, *v.* Williams et al. C. A. 2d Cir. Certiorari denied. *Carl J. Austrian, Saul J. Lance* and *Isadore H. Cohen* for petitioners. *Arthur H. Dean* and *Milton Pollack* for Williams, respondent. *Acting Solicitor General Stern* and *Roger S. Foster* filed a memorandum for the Securities & Exchange Commission, as *amicus curiae,* supporting the petition. Reported below: 198 F. 2d 697.

No. 436. Humble Oil & Refining Co. et al. *v.* United States. C. A. 10th Cir. Certiorari denied. *Hiram M. Dow* and *Nelson Jones* for the Humble Oil & Refining Co., *U. M. Rose* and *G. T. Hanners* for Moseley, petitioners. *Rex G. Baker* was also of counsel. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 198 F. 2d 753.

No. 441. Traders Compress Co. *v.* Tobin, Secretary of Labor. C. A. 10th Cir. Certiorari denied. *John H. Todd* and *C. B. Cochran* for petitioner. *Solicitor General Cummings, William S. Tyson* and *Bessie Margolin* filed a memorandum stating that respondent does not oppose the granting of the petition for certiorari. Reported below: 199 F. 2d 8.

No. 248, Misc. Booth *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 2d 991.

No. 249, Misc. McCullough *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied.

No. 250, Misc. WESTBURY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 252, Misc. TATE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 256, Misc. PAPPAS *v.* RAGEN, WARDEN. Circuit Court of Rock Island County, Illinois. Certiorari denied.

No. 258, Misc. CARROLL *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 257, Misc. MAHURIN *v.* EIDSON, WARDEN. Petition for writ of certiorari to the Supreme Court of Missouri and for other relief denied.

Rehearing Denied.

No. 12. FEDERAL POWER COMMISSION *v.* IDAHO POWER CO., *ante*, p. 17. Rehearing denied. MR. JUSTICE BURTON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 10. UNITED STATES *v.* HENNING ET AL., *ante*, p. 66;

No. 185. MILLIKEN *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 884;

No. 210. DUVEEN BROTHERS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 884;

No. 314. MCRAE *v.* WOODS, ACTING HOUSING EXPEDITER, *ante*, p. 892;

No. 78, Misc. KUIKEN *v.* UNITED STATES, *ante*, p. 867; and

No. 135, Misc. CHORAK ET AL. *v.* R. K. O. PICTURES, INC. ET AL., *ante*, p. 887. Petitions for rehearing denied.

JANUARY 5, 1953.

Miscellaneous Orders.

No. 181. CLEMENTS, COMMISSIONER OF WILD LIFE AND FISHERIES OF LOUISIANA, *v.* GOSPODONOVICH ET AL. Appeal from the United States District Court for the Eastern District of Louisiana. Appeal dismissed on motion of all of the parties. *John J. Finnorn* for appellant. Reported below: 108 F. Supp. 234.

No. 275, Misc. DUNLAP *v.* WARDEN, TEXAS PRISON. Motion for leave to file petition for writ of certiorari denied.

Certiorari Granted.

No. 440. UNITED STATES *v.* GILBERT ASSOCIATES, INC. Supreme Court of New Hampshire. Certiorari granted. *Acting Solicitor General Stern* for the United States. Reported below: 97 N. H. 411, 90 A. 2d 499.

Certiorari Denied. (*See also No. 275, Misc., supra.*)

No. 248. UNITED STATES *v.* PRICE. Court of Claims. Certiorari denied. *Philip B. Perlman,* then Solicitor General, for the United States. *Samuel T. Ansell* for respondent. Reported below: 121 Ct. Cl. 664, 104 F. Supp. 99.

No. 249. UNITED STATES *v.* WATERBURY. Court of Claims. Certiorari denied. *Philip B. Perlman,* then Solicitor General, for the United States. *Samuel T. Ansell* for respondent. Reported below: 121 Ct. Cl. 687.

No. 250. UNITED STATES *v.* PARTRIDGE, EXECUTRIX. Court of Claims. Certiorari denied. *Philip B. Perlman,* then Solicitor General, for the United States. *Samuel T. Ansell* for respondent. Reported below: 121 Ct. Cl. 695.

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No. 379. DANFORTH *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cummings, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 122 Ct. Cl. 785.

No. 396. CREAMER *v.* OGDEN UNION RAILWAY & DEPOT CO. Supreme Court of Utah. Certiorari denied. *Calvin W. Rawlings* and *Harold E. Wallace* for petitioner. *Bryan P. Leverich* for respondent. Reported below: —— Utah ——, 242 P. 2d 575.

No. 405. UNION CITY TRANSFER ET AL. *v.* ADAMS. Court of Civil Appeals of Texas, Second Supreme Judicial District. Certiorari denied. *John H. Benckenstein* for petitioners. Reported below: 248 S. W. 2d 256.

No. 423. FAUROT ET AL. *v.* MOORE ET AL. C. A. 10th Cir. Certiorari denied. *David C. Shapard, William S. Campbell* and *Wm. McCraw* for petitioners. Reported below: 196 F. 2d 883.

No. 425. HOLMES PROJECTOR CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *George F. von Kolnitz, Jr.* and *Harold E. Marks* for petitioner. *Solicitor General Cummings, Assistant Attorney General Lyon* and *Ellis N. Slack* for the United States. Reported below: 123 Ct. Cl. 278, 105 F. Supp. 690.

No. 428. CONSUMER SALES CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Bertram J. Dembo* for petitioners. *Solicitor General Cummings, Acting Assistant Attorney General Clapp, Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 198 F. 2d 404.

No. 432. KENNEY *v.* WABASH RAILROAD CO. C. A. 5th Cir. Certiorari denied. *Robert Ash* for petitioner. *James J. Morrison* for respondent. Reported below: 196 F. 2d 162.

No. 434. BRYANT *v.* UNITED STATES. Court of Claims. Certiorari denied. *Leon A. Ransom* for petitioner. *Solicitor General Cummings, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 122 Ct. Cl. 460.

No. 435. RICHMOND *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. C. A. 5th Cir. Certiorari denied. Reported below: 197 F. 2d 840.

No. 438. BROWN LAND & ROYALTY CO., INC. *v.* GREEN ET AL. C. A. 5th Cir. Certiorari denied. *Frank J. Looney* for petitioner. *Richard C. Cadwallader* for Green et al., respondents. Reported below: 198 F. 2d 74.

No. 449. UNITED STATES EX REL. DAVERSE *v.* HOHN, WARDEN. C. A. 3d Cir. Certiorari denied. *William D. Donnelly* for petitioner. Reported below: 198 F. 2d 934.

No. 452. MOTOROLA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Irving A. Jennings* and *Robert N. Denham* for petitioner. *Solicitor General Cummings, George J. Bott, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 199 F. 2d 82.

No. 453. VEAL ET AL. *v.* LEIMKUEHLER ET AL. St. Louis Court of Appeals of Missouri. Certiorari denied. Reported below: 249 S. W. 2d 491.

No. 456. MCNISH *v.* AMERICAN BRASS CO. ET AL. Supreme Court of Errors of Connecticut. Certiorari denied.

David R. Lessler for petitioner. *William J. Larkin, Jr.* for the American Brass Co.; and *Margaret C. Driscoll* for the Ansonia Brass Workers Union Local 445, respondents. Reported below: 139 Conn. 44, 89 A. 2d 566.

No. 457. DWORSKY ET AL., DOING BUSINESS AS FIDELITY FACTORS, *v.* LEICHTER. C. A. 3d Cir. Certiorari denied. *Max L. Rosenstein* for petitioners. *George F. Losche* for respondent. Reported below: 197 F. 2d 955.

No. 462. UNITED HOISTING CO., INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Edward D. Bolton* for petitioners. *Solicitor General Cummings, John R. Benney* and *George J. Bott* for respondent. Reported below: 198 F. 2d 465.

No. 464. FIRST NATIONAL BANK IN HOUSTON ET AL. *v.* LAKE, TRUSTEE. C. A. 4th Cir. Certiorari denied. *Hilary W. Gans* and *Leon Jaworski* for petitioners. *Frank B. Ober* for respondent. Reported below: 199 F. 2d 524.

No. 467. KELLEY, GLOVER & VALE, INC., TRUSTEE, *v.* KRAMER ET AL. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Arthur J. Goldberg* for respondents. Reported below: 198 F. 2d 392.

No. 409. AMERICAN SNUFF CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Newell N. Fowler, Ceylon B. Frazer* and *Robert N. Denham* for petitioners. *Solicitor General Cummings, George J. Bott, David P. Findling, Mozart G. Ratner, Bernard Dunau* and *Harvey B. Diamond* for respondent. Reported below: 196 F. 2d 1019.

No. 420. HOWARD ET AL. *v.* HOSKINS ET AL. Motion for an extension of time to file petition for writ of certiorari denied. Petition for writ of certiorari to the Supreme Court of Mississippi denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). *Leon A. Ransom* and *Perry W. Howard* for petitioners. Reported below: 214 Miss. 481, 59 So. 2d 263.

No. 523. UNITED STEELWORKERS OF AMERICA, CIO, LOCAL 2286, ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *Arthur J. Goldberg* and *Thomas E. Harris* for petitioners. *Solicitor General Cummings, Assistant Attorney General Baldridge, Robert L. Stern, Philip Elman, Samuel D. Slade* and *Herman Marcuse* for the United States.

No. 199, Misc. WILSON *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se.* *Smith Troy,* Attorney General of Washington, and *Rudolph Naccarato,* Assistant Attorney General, for respondent.

No. 229, Misc. FARNSWORTH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 91 U. S. App. D. C. 121, 198 F. 2d 600.

No. 261, Misc. PYLE *v.* KANSAS ET AL. Supreme Court of Kansas. Certiorari denied.

No. 264, Misc. NATIONS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. District Court of Brown County, Brownwood, Texas. Certiorari denied.

January 5, 12, 1953. 344 U. S.

No. 266, Misc. BAUGH *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 269, Misc. KAMROWSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 412 Ill. 383, 107 N. E. 2d 725.

No. 260, Misc. LEONARD *v.* NORTH CAROLINA. Petition for writ of certiorari to the Supreme Court of North Carolina denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (d); Rule 38½ of the Rules of the Supreme Court. *Robert S. Cahoon* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *Claude L. Love,* Assistant Attorney General, for respondent. Reported below: 236 N. C. 126, 72 S. E. 2d 1.

Rehearing Denied.

No. 39. BAUMET ET AL. *v.* UNITED STATES ET AL., *ante,* p. 82;

No. 100. SWEENEY, SHERIFF, *v.* WOODALL, *ante,* p. 86;

No. 381. AMERICAN PRESIDENT LINES, LTD. *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL., *ante,* p. 892;

No. 200, Misc. THOMAS *v.* CALIFORNIA, *ante,* p. 881; and

No. 475, Misc., October Term, 1951. AYERS *v.* PARRY ET AL., 343 U. S. 890. Petitions for rehearing denied.

JANUARY 12, 1953.

Per Curiam Decisions.

No. 218. MARTINEZ *v.* NEELLY, SUCCESSOR TO JORDAN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 344 U. S. 810, to the United States Court of Appeals for the Seventh Circuit. Argued January 5, 1953. Decided January 12, 1953. *Per Curiam:*

The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Eugene Cotton* argued the cause and filed a brief for petitioner. *Solicitor General Cummings* argued the cause for respondent. With him on the brief were *Assistant Attorney General Murray, Robert W. Ginnane, Beatrice Rosenberg* and *Kenneth C. Shelver*. Reported below: 197 F. 2d 462.

No. 463. CHICAGO & EASTERN ILLINOIS RAILROAD CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of Indiana. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE REED are of the opinion that probable jurisdiction should be noted and the case set down for argument. *David O. Mathews, Thomas N. Cook, Gerald L. Phelps* and *John T. Hays* for appellant. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *George S. Dixon* and *Elbert R. Gilliom* for the National Automobile Transporters Association et al., appellees. Reported below: 107 F. Supp. 118.

Miscellaneous Order.

No. ——. TINKOFF *v.* UNITED STATES. The petition to vacate the order denying an extension of time to file petition for writ of certiorari and the motion for an extension of time to file petition for writ of certiorari are denied.

Certiorari Denied.

No. 395. VAUGHAN *v.* PETROLEUM CONVERSION CORP. C. A. 3d Cir. Certiorari denied. *Gerard P. Kavanaugh* for petitioner. *Thomas Cooch* for respondent. Reported below: 196 F. 2d 728.

No. 450. DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* McGOWAN. Supreme Court of Utah. Certiorari denied. *Dennis McCarthy* for petitioner. *Calvin W. Rawlings* and *Harold E. Wallace* for respondent. Reported below: —— Utah ——, 244 P. 2d 628.

No. 468. ERNST *v.* JEWEL TEA CO., INC., DOING BUSINESS AS JEWEL FOOD STORES. C. A. 7th Cir. Certiorari denied. *Thomas D. Nash* for petitioner. *Alvin G. Hubbard* for respondent. Reported below: 197 F. 2d 881.

No. 255, Misc. JAQUISH *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Elizabeth Cassidy* for petitioner.

No. 270, Misc. HUBBARD *v.* KING, SUPERINTENDENT OF MEDICAL FACILITY. C. A. 9th Cir. Certiorari denied.

No. 272, Misc. DUTY *v.* MUNIE, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 278, Misc. DAUPHLEY *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 279, Misc. ROSS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 280, Misc. PERKINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 281, Misc. ALLISON *v.* MUNIE, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

Rehearing Denied. (*See also No. ——, Tinkoff v. United States, supra.*)

No. 16. UNITED STATES *v.* CALTEX (PHILIPPINES), INC. ET AL., *ante*, p. 149;

No. 419. UNITED BRICK & CLAY WORKERS OF AMERICA ET AL. *v.* DEENA ARTWARE, INC., *ante*, p. 897;

No. 219, Misc. ELLIS *v.* HEINZE, WARDEN, *ante*, p. 894; and

No. 486, Misc., October Term, 1951. LAWRENCE *v.* UNITED STATES, 343 U. S. 981. Petitions for rehearing denied.

JANUARY 19, 1953.

Per Curiam Decision.

No. 429. LIONSHEAD LAKE, INC. *v.* TOWNSHIP OF WAYNE. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Albert L. Reeves, Jr.* and *William D. Donnelly* for appellant. *James J. Langan* and *Fred G. Stickel, III* for appellee. Reported below: 10 N. J. 165, 89 A. 2d 693.

Miscellaneous Order.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The motion for leave to file the complaint is granted and process is ordered to issue returnable within 60 days. The motion of the United States for leave to intervene is granted. *Fred O. Wilson,* Attorney General of Arizona, *Alexander B. Baker,* Chief Assistant Attorney General, *John H. Moeur, Burr Sutter* and *Perry M. Ling* for complainant. *Edmund G. Brown,* Attorney General of California, *Arvin B. Shaw, Jr.,* Assistant Attorney

General, *Gilbert F. Nelson,* Deputy Attorney General, *Northcutt Ely, Harry W. Horton, Earl Redwine, James H. Howard, Charles C. Cooper, Jr., Donald M. Keith, Ray L. Chesebro* and *T. B. Cosgrove* for defendants. *Attorney General McGranery* and *Solicitor General Cummings* for the United States.

Certiorari Denied.

No. 443. Drown, trading as Drown Laboratories, *v.* United States. C. A. 9th Cir. Certiorari denied. *Rollin L. McNitt* and *Edythe Jacobs* for petitioner. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 198 F. 2d 999.

No. 469. Pacific Employers Insurance Co. *v.* Reed Roller Bit Co. C. A. 5th Cir. Certiorari denied. *John H. Crooker* for petitioner. *J. Vincent Martin* and *J. D. Head* for respondent. Reported below: 198 F. 2d 1.

No. 470. United Mine Workers of America et al. *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. *Welly K. Hopkins* and *Harrison Combs* for petitioners. *Solicitor General Cummings, George J. Bott, David P. Findling, Mozart G. Ratner, Dominick L. Manoli* and *Margaret M. Farmer* for respondent. Reported below: 195 F. 2d 961.

No. 472. Wagstaff *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 91 U. S. App. D. C. 146, 198 F. 2d 955.

No. 475. THOMAS, ADMINISTRATRIX, *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 4th Cir. Certiorari denied. *Bernard M. Savage* and *William L. Parker* for petitioner. *Strother Hynes* for respondent. Reported below: 198 F. 2d 783.

No. 477. L. A. GOODMAN MANUFACTURING CO. *v.* BORKLAND. Appellate Court of Illinois, First District. Certiorari denied. *Lloyd D. Heth* for petitioner. *Harold A. Smith* for respondent. Reported below: 345 Ill. App. 610, 104 N. E. 2d 347.

No. 478. CENTRAL FRUIT & VEGETABLE CO. ET AL. *v.* ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *J. Manuel Hoppenstein* for petitioners. Reported below: 198 F. 2d 808.

No. 479. CHRYSLER CORPORATION *v.* KANATSER. C. A. 10th Cir. Certiorari denied. *David A. Richardson* for petitioner. Reported below: 199 F. 2d 610.

No. 484. OKLAHOMA CONTRACTING CO., INC. *v.* MAGNOLIA PIPE LINE CO. C. A. 5th Cir. Certiorari denied. *O. R. McGuire* and *William S. Campbell* for petitioner. *Earl A. Brown, Chas. B. Wallace* and *John E. McClure* for respondent. Reported below: 195 F. 2d 391.

No. 486. ADVERTISERS EXCHANGE, INC. *v.* HINKLEY, DOING BUSINESS AS HINKLEY SELF SERVICE GROCERY. C. A. 8th Cir. Certiorari denied. *Louis Fieldman* for petitioner. Reported below: 199 F. 2d 313.

No. 365. DRAGNA *v.* CALIFORNIA. Appellate Department of the Superior Court of California, County of Los Angeles. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should

be granted. *John Walsh* for petitioner. *Ray L. Chesebro* and *Philip E. Grey* for respondent.

No. 465. Air Transport Associates, Inc. *v.* Civil Aeronautics Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Black, Mr. Justice Reed, and Mr. Justice Douglas are of the opinion certiorari should be granted. *Warren E. Miller* for petitioner. *Solicitor General Cummings, Emory T. Nunneley, Jr.* and *O. D. Ozment* for respondent. *George M. Morris* filed a brief for the Aircoach Transport Association, as *amicus curiae,* in support of the petition. Reported below: 91 U. S. App. D. C. 147, 199 F. 2d 181.

No. 480. Des Marais et al. *v.* Beckman, Administratrix. C. A. 9th Cir. Certiorari denied. Mr. Justice Reed is of the opinion certiorari should be granted. *Edward V. Davis* for petitioners. Reported below: 198 F. 2d 550.

No. 204, Misc. Frankfeld et al. *v.* United States. C. A. 4th Cir. Motions for leave to file briefs of National Lawyers Guild and John Abt et al., as *amici curiae,* denied. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted. *Joseph Forer, Royal W. France* and *Harold Buchman* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Murray, Beatrice Rosenberg, Murry Lee Randall* and *Edward S. Szukelewicz* for the United States. Reported below: 198 F. 2d 679.

No. 262, Misc. Cochran *v.* Missouri et al. Supreme Court of Missouri. Certiorari denied.

No. 282, Misc. PUTNAM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 286, Misc. BARDELL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 289, Misc. BALDRIDGE *v.* KANE COUNTY CIRCUIT COURT ET AL. Supreme Court of Illinois. Certiorari denied.

No. 292, Misc. HABERMANN *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 2d 664.

Rehearing Denied.

No. 407. KROSS *v.* CALIFORNIA, *ante,* p. 908;

No. 447. CROSS *v.* TUSTIN ET AL., *ante,* p. 900; and

No. 455. NORTHERN PACIFIC RAILWAY CO. ET AL. *v.* MONTANA ET AL., *ante,* p. 905. Petitions for rehearing denied.

FEBRUARY 2, 1953.

Per Curiam Decisions.

No. 197. UNITED STATES *v.* WILSON, DOING BUSINESS AS COOPERATIVE BUYING SERVICE; and

No. 198. UNITED STATES *v.* PURCHASING CORPORATION OF AMERICA ET AL. Appeals from the United States District Court for the Eastern District of Louisiana. Argued January 5–6, 1953. Decided February 2, 1953. *Per Curiam:* The judgments are affirmed. MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON dissent. MR. JUSTICE CLARK took no part in the consideration or decision of these cases. *John F. Davis* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General*

Murray, Beatrice Rosenberg and *J. F. Bishop. Philip B. Perlman,* then Solicitor General, was on the Statements as to Jurisdiction. *Selden S. McNeer* argued the cause for appellees. With him on the brief was *Hobart L. McKeever.*

No. 390. Ward *v.* United States. Certiorari, 344 U. S. 814, to the United States Court of Appeals for the Fifth Circuit. Argued January 13, 1953. Decided February 2, 1953. *Per Curiam:* The indictment in this case charged that between the dates of March 30, 1951, and May 31, 1951, petitioner "knowingly" failed to furnish his local Selective Service Board with a correct address where mail might be delivered to him. 50 U. S. C. App. §§ 462 (a), 465 (b); 32 CFR § 1641.3. The record does not support the charge that, during this period, there was deliberate purpose on the part of petitioner not to comply with the Selective Service Act or the regulation issued thereunder. Accordingly, the decision below is reversed. *John M. Coe* and *Ralph E. Powe* argued the cause for petitioner. With them on the brief was *James T. Wright. John R. Benney* argued the cause for the United States. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Carl H. Imlay.* Reported below: 195 F. 2d 441.

No. 459. National Labor Relations Board *v.* American Thread Co. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit; and

No. 460. National Labor Relations Board *v.* Nina Dye Works Co., Inc. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petitions for writs of certiorari are granted and the judgments are reversed. *Labor*

Board v. *Dant, ante,* p. 375, decided this day. *Acting Solicitor General Stern* and *George J. Bott* for petitioner. Reported below: 198 F. 2d 137, 362.

No. 503. Herrin Transportation Co., Inc. et al. *v.* United States et al. Appeal from the United States District Court for the Eastern District of Louisiana. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. Mr. Justice Black is of the opinion that probable jurisdiction should be noted and the case set down for argument. *Robert A. Ainsworth, Jr.* for appellants. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Allan Watkins* for the Atlanta-New Orleans Motor Freight Co. et al., appellees. Reported below: 108 F. Supp. 89.

No. 505. Malone Freight Lines, Inc. *v.* United States et al. Appeal from the United States District Court for the Northern District of Alabama. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. Mr. Justice Black and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set down for argument. *James W. Wrape, W. H. Brantley, Jr.* and *Glenn M. Elliott* for appellant. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Peyton D. Bibb, Reuben G. Crimm, Allan Watkins* and *Edgar Watkins* for Akers Motor Lines, Inc. et al., appellees. Reported below: 107 F. Supp. 946.

No. 516. Redwine, State Revenue Commissioner, et al. *v.* Georgia Railroad & Banking Co. Appeal from the United States District Court for the Northern District of Georgia. *Per Curiam:* The motion to affirm

is granted and the judgment is affirmed. *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420; *Georgia R. Co.* v. *Redwine*, 342 U. S. 299. MR. JUSTICE BLACK dissents. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set down for argument. *Eugene Cook*, Attorney General of Georgia, *M. H. Blackshear, Jr.*, Deputy Attorney General, and *Lamar W. Sizemore*, Assistant Attorney General, for Redwine, *Harold Sheats* and *Standish Thompson* for Fulton County, and *Victor Davidson* and *Cleburne E. Gregory, Jr.* for the City of Union Point et al., appellants. *Robert B. Troutman* and *Furman Smith* for appellee.

Miscellaneous Orders.

No. 296. ALSTATE CONSTRUCTION CO. *v.* TOBIN, SECRETARY OF LABOR;

No. 336. JOHNSON ET AL., DOING BUSINESS AS BRAMHALL COMPANY, *v.* TOBIN, SECRETARY OF LABOR; and

No. 380. PENNINGTON-WINTER CONSTRUCTION CO. *v.* TOBIN, SECRETARY OF LABOR. Durkin, present Secretary of Labor, substituted as the party respondent for Tobin.

No. 294, Misc. CAMPBELL *v.* PENNSYLVANIA ET AL.;

No. 295, Misc. HOWELL *v.* HANN, WARDEN;

No. 317, Misc. HENRY *v.* BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON; and

No. 320, Misc. RILEY *v.* STEINBERG, SUPERINTENDENT, ELGIN STATE HOSPITAL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 308, Misc. MARSHALL *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus and for other relief denied.

No. 323, Misc. GEACH *v.* CRIMINAL COURT OF COOK COUNTY, ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (*See also Nos. 459 and 460, supra.*)

No. 508. UNITED STATES *v.* INTERNATIONAL BUILDING CO. C. A. 8th Cir. Certiorari granted. *Solicitor General Cummings* for the United States. *Irl B. Rosenblum* for respondent. Reported below: 199 F. 2d 12.

Certiorari Denied.

No. 466. MALONE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *Leo R. Friedman* for petitioners. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Kenneth C. Shelver* for the United States in opposition.

No. 473. UNITED STATES *v.* TOWN OF CLARKSVILLE, VIRGINIA. C. A. 4th Cir. Certiorari denied. *Acting Solicitor General Stern* for the United States. Reported below: 198 F. 2d 238.

No. 485. PENN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Chas. Claflin Allen* for petitioner. *Solicitor General Cummings, Assistant Attorney General Lyon, Ellis N. Slack* and *Louise Foster* for respondent. Reported below: 199 F. 2d 210.

No. 489. PLACE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Robert M. Drysdale* for petitioner. *Solicitor General Cummings, Assistant Attorney General Lyon, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 199 F. 2d 373.

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No. 490. WHETSTONE *v.* SAUBER, DIRECTOR OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cummings, Assistant Attorney General Lyon, Ellis N. Slack* and *Fred E. Youngman* for respondent. Reported below: 199 F. 2d 520.

No. 491. HOXSEY CANCER CLINIC ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Herbert K. Hyde* and *Roy St. Lewis* for petitioners. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *William W. Goodrich* for the United States. Reported below: 198 F. 2d 273.

No. 492. ONE 1951 FORD PICK-UP ¾ TON TRUCK ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *David L. Ullman* for the Hammonton Investment & Mortgage Co., petitioner. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 199 F. 2d 450.

No. 493. MCGUIRE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Eldridge Hood Young* for petitioner. *Edward D. E. Rollins,* Attorney General of Maryland, and *Kenneth C. Proctor,* Assistant Attorney General, for respondent. Reported below: —— Md. ——, 92 A. 2d 582.

No. 510. W. T. GRANT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Eugene M. Foley* for petitioner. *Solicitor General Cummings, George J. Bott, David P. Findling, Bernard Dunau* and *Marcel Mallet-Prevost* for respondent. Reported below: 199 F. 2d 711.

No. 481. CLAWSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William Strong* for petitioner. *Solicitor General Cummings, Assistant Attorney General Lyon, Ellis N. Slack* and *Fred G. Folsom* for the United States. Reported below: 198 F. 2d 792.

No. 483. BIGGS *v.* FEINBERG ET AL. C. A. 7th Cir. Motion to strike respondent's brief denied. Certiorari also denied. Petitioner *pro se*. *Charles Leviton, Hirsch E. Soble, Jacob Shamberg* and *John J. Kelly, Jr.* for respondents.

No. 196, Misc. WHITING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 196 F. 2d 619.

No. 246, Misc. CLARK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States.

No. 254, Misc. MCQUAID *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Cummings, Assistant Attorney General Murray* and *Beatrice Rosenberg* for the United States. Reported below: 91 U. S. App. D. C. 229, 198 F. 2d 987.

No. 274, Misc. WOOLLOMES *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 2d 577.

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No. 284, Misc. KELLS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 2d 710.

No. 285, Misc. HENSON *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 2d 952.

No. 287, Misc. KIRSCH *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 288, Misc. KOCIELKO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 413 Ill. 286, 108 N. E. 2d 770.

No. 296, Misc. SPENCER *v.* NEW YORK. Court of General Sessions of New York, New York County. Certiorari denied.

No. 297, Misc. MOORE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Reported below: 236 N. C. 617, 73 S. E. 2d 467.

No. 301, Misc. BOWEN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 305, Misc. CHESNEY *v.* CALIFORNIA. Appellate Department, Superior Court of California, Los Angeles County. Certiorari denied. *G. G. Baumen* for petitioner.

No. 306, Misc. O'CONNELL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 309, Misc. HOLLY *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 313, Misc. Mosher *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

No. 316, Misc. McGhee *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

No. 318, Misc. Connors *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 413 Ill. 386, 108 N. E. 2d 774.

No. 328, Misc. Wallace *v.* Heck, as Assemblyman and Speaker of the State Assembly of New York. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Nathaniel L. Goldstein*, Attorney General of New York, and *Wendell P. Brown*, Solicitor General, for respondent. Reported below: 199 F. 2d 151.

No. 303, Misc. Henley *v.* Moore, Warden. On consideration of the suggestion of a diminution of the record and a motion for a writ of certiorari in that relation, the motion for a writ of certiorari is denied. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit also denied. Reported below: 199 F. 2d 752.

Rehearing Denied.

No. 435. Richmond *v.* St. Louis Southwestern Railway Co., *ante*, p. 913. Rehearing denied.

No. 441. Traders Compress Co. *v.* Tobin, Secretary of Labor, *ante*, p. 909. Durkin, present Secretary of Labor, substituted as the party respondent for Tobin. Rehearing denied.

No. 252, Misc. Tate *v.* California, *ante*, p. 910. Rehearing denied.

FEBRUARY 9, 1953.

Miscellaneous Orders.

No. 5, Original, October Term, 1950. NEW JERSEY *v.* NEW YORK ET AL. The motion of the State of New Jersey for leave to file amended and supplemental answer is granted. The motion of the Commonwealth of Pennsylvania for leave to file amended answer is granted. The motion of the City of Philadelphia for leave to intervene is assigned for argument on Monday, March 9, next, twenty minutes to be allowed each party appearing. *Theodore D. Parsons,* Attorney General, *Robert Peacock,* Deputy Attorney General, and *Kenneth H. Murray* for the State of New Jersey, complainant. *Nathaniel L. Goldstein,* Attorney General, *Wendell P. Brown,* Solicitor General, and *Edward L. Ryan,* Assistant Attorney General, for the State of New York, defendant. *Denis M. Hurley, John P. McGrath, Jeremiah M. Evarts* and *Richard H. Burke* for the City of New York, defendant. *Robert E. Woodside,* Attorney General, *George G. Chandler, Bernard G. Segal, Wm. A. Schnader* and *Harry F. Stambaugh* for the State of Pennsylvania, intervenor. *Abraham L. Freedman* for the City of Philadelphia.

No. 322, Misc. ENDERS *v.* JACQUES, WARDEN, ET AL. Supreme Court of Michigan. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 302, Misc. CURTIS *v.* FORMAN, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus or prohibition denied.

No. 333, Misc. ALLEN *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 310, Misc. GERUNDO *v.* TEETS, WARDEN;
No. 311, Misc. EDWARDS *v.* OVERHOLSER;
No. 312, Misc. EMERSON *v.* CALLAHAN, SHERIFF;
No. 329, Misc. POSEY *v.* DOWD, WARDEN; and
No. 330, Misc. GRAHAM *v.* DOWD, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 499, ante, p. 630.*)

No. 509. TRANSCONTINENTAL & WESTERN AIR, INC. *v.* KOPPAL. C. A. 8th Cir. Certiorari granted limited to questions 1 and 2 presented by the petition for the writ, *viz.:*

"1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.

"2. Whether the decisions of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, bar the application of state law requiring an employee to attempt to adjust his dispute with his employer before he may seek redress in state courts for alleged breach of a collective bargaining agreement made pursuant to the Railway Labor Act."

Gerald B. Brophy, Ruby D. Garrett and *Horace G. Hitchcock* for petitioner. Reported below: 199 F. 2d 117.

Certiorari Denied. (*See also Misc. Nos. 322 and 333, supra.*)

No. 411. MULLEN *v.* FITZ SIMONS & CONNELL DREDGE & DOCK CO. C. A. 7th Cir. Certiorari denied. *Irving Breakstone* for petitioner. *Edward B. Hayes* for respondent. Reported below: 199 F. 2d 557.

No. 504. STILLEY PLYWOOD CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari de-

nied. *John H. Lumpkin* for petitioner. *Solicitor General Cummings, George J. Bott, David P. Findling* and *Bernard Dunau* for respondent. Reported below: 199 F. 2d 319.

No. 507. Weiss *v.* United States. C. A. 2d Cir. Certiorari denied. *Sidney Morse* for petitioner. *Solicitor General Cummings, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 199 F. 2d 454.

No. 513. Suver et al. *v.* Kentucky. Court of Appeals of Kentucky. Certiorari denied. *Harrison Combs* for petitioners.

No. 514. Frizzell *v.* Wabash Railroad Co. C. A. 8th Cir. Certiorari denied. *John R. Baty* for petitioner. *Sam B. Sebree* for respondent. Reported below: 199 F. 2d 153.

No. 519. Sig Ellingson & Co. *v.* De Vries et al. C. A. 8th Cir. Certiorari denied. *Clarence G. Myers* for petitioner. *J. Neil Morton* for respondents. Reported below: 199 F. 2d 677.

No. 520. Sig Ellingson & Co. *v.* Butenbach, doing business as Garner Sales Co. C. A. 8th Cir. Certiorari denied. *Clarence G. Myers* for petitioner. *Alice Elizabeth Culhane Fiddes* for respondent. Reported below: 199 F. 2d 679.

No. 530. Hansen Manufacturing Co., Inc. *v.* General Time Corp. C. A. 7th Cir. Certiorari denied. *Casper W. Ooms, Ralph G. Lockwood* and *Isidor Kahn* for petitioner. *W. Brown Morton* for respondent. Reported below: 199 F. 2d 259.

No. 277, Misc. MAHONEY *v.* BOWLES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Andrew W. Carroll* for petitioner. *Vernon E. West, Chester H. Gray* and *Hubert B. Pair* for the District of Columbia; and *Cornelius Doherty* for Bowles, respondents. Reported below: 91 U. S. App. D. C. 155, 202 F. 2d 320.

No. 298, Misc. GLENN, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 4th Cir. Certiorari denied. *Henry Hammer* for petitioner. Reported below: 198 F. 2d 232.

No. 299, Misc. OBIE *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *Tyrah Ernest Maholm* for petitioner. Reported below: 231 Ind. 142, 106 N. E. 2d 452.

No. 304, Misc. FINK *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 314, Misc. BRENNAN *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se. Solicitor General Cummings, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 123 Ct. Cl. 326.

No. 315, Misc. DE LORENZO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 321, Misc. SCOTT *v.* BABB, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied. *Herbert M. Wetzel* for petitioner. *Melvin F. Wingersky* for respondents. Reported below: 199 F. 2d 804.

No. 325, Misc. GADSDEN *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se. Solici-*

tor General Cummings, Assistant Attorney General Baldridge and *Paul A. Sweeney* for the United States. Reported below: See 119 Ct. Cl. 86, 100 F. Supp. 455.

No. 326, Misc. HARDMAN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 332, Misc. CLARK *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 335, Misc. MALEK *v.* WARDEN, MICHIGAN STATE PRISON. Supreme Court of Michigan. Certiorari denied.

No. 324, Misc. GERUNDO *v.* CALIFORNIA. Petition for writ of certiorari to the District Court of Appeal of California, Third Appellate District, denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (d); Rule 38½ of the Rules of the Supreme Court. Reported below: 112 Cal. App. 2d 797, 863, 247 P. 2d 374, 398.

Rehearing Denied.

No. 9. KING ET AL., CONSTITUTING THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, *v.* UNITED STATES ET AL., *ante*, p. 254. Rehearing denied.

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No. 422. BURNS ET AL. *v.* LOVETT, SECRETARY OF DEFENSE, ET AL. February 5, 1953. Wilson, present Secretary of Defense, substituted for Lovett.

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